

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

WOMACK NEWSPAPERS, INC., D/B/A *THE OUTER BANKS SENTINEL*, PLAINTIFF V.
THE TOWN OF KITTY HAWK THROUGH THE KITTY HAWK TOWN COUNCIL;
WILLIAM A. HARRIS IN HIS CAPACITY AS MAYOR; DOUG SEAY, IN HIS CAPACITY
AS MAYOR PRO TEMPORE; ERVIN BATEMAN, CLIFTON PERRY AND DONNA
TRIVETTE, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN COUNCIL; GARY McGEE
AND INNOVATIVE MANAGEMENT SERVICES, LLC, IN THEIR CAPACITY AS
TOWN MANAGER; AND NORMAN W. SHEARIN, JR., DANIEL D. KHOURY AND
VANDEVENTER BLACK LLP, IN THEIR CAPACITY AS TOWN ATTORNEYS, DEFENDANTS

No. COA05-1650

(Filed 2 January 2007)

1. Appeal and Error— mootness—public records voluntarily furnished during appeal

A portion of an appeal was moot where Town records that plaintiffs had sought under the Public Records Act were released voluntarily after appeal was taken following litigation. Although the records were released pursuant to a Town resolution stating that they were not public records, the precise relief sought by plaintiff in its complaint was granted. Exceptions to the mootness doctrine do not apply, and deciding whether the records sought were in fact public records would amount to an advisory opinion.

2. Appeal and Error— assignments of error—insufficiency

Defendants' assignments of error to the signing and entry of orders were dismissed as insufficient even though defendants contended that the legal bases for these assignments of error was stated earlier, that further elaboration would have added nothing,

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and that plaintiff and the court were on notice of the issues on appeal. N.C. R. App. P. 10 (c)(1).

3. Public Records— documents held by law firm rather than town—Public Records Act applicable

Records concerning engineering, surveying, and other professional services rendered to defendant Town in connection with oceanfront condemnation litigation were public records even though they were not held by the Town. The Town paid for the records and they were made or received in connection with the transaction of public business. The law firm holding the records was duly appointed as the Town's attorney and was a public officer of the Town subject to the Public Records Act in its dealings with the Town.

4. Public Records— writ of mandamus for release—appropriateness

The trial court did not err by refusing to dismiss a petition for a writ of mandamus for the release of certain Town records. Although defendants argued that the records were not public records and that releasing them was in the Town's discretion, so that a writ of mandamus was not appropriate, the records are in fact public records subject to disclosure.

5. Pleadings— motion to strike allegations—Public Records Act compliance—relevant and material

The trial court did not err by not striking allegations in an amended complaint that sought public records where defendant contended that the allegations contradicted or were not supported by the Town records, but the allegations questioned the Town's compliance with the Public Records Act and not the accuracy of the records. N.C.G.S. § 1A-1, Rule 12(f).

6. Public Records— reporter who made initial request and town clerk not necessary parties

The trial court did not err by refusing to dismiss a public records complaint for lack of standing and failure to join necessary parties where the action was not brought by the reporter who made the initial request and the Town clerk was not named as a defendant. The requests for the records were made on behalf of plaintiff newspaper, and all of the responsible Town officials were included.

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Appeal by defendants from orders entered 7 April 2005, 2 May 2005 and 2 June 2005 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 13 September 2006.

Everett, Gaskins, Hancock & Stevens, LLP by Hugh Stevens and Michael J. Tadych, for plaintiff-appellee.

Vandeventer Black LLP, by David P. Ferrell and Allison A. Holmes, for defendant-appellants.

JACKSON, Judge.

The Town of Kitty Hawk, North Carolina (“Town”), is a municipal corporation organized and existing pursuant to North Carolina General Statutes Chapter 160A. The law firm of Vandeventer Black LLP was duly appointed and served as the Town Attorney, pursuant to an agreement entered into between defendant Town and the firm on 19 April 2002 and section 160A-173. Womack Newspapers, Inc. (“plaintiff”), publishes and does business as *The Outer Banks Sentinel* (“The Sentinel”), a bi-weekly newspaper published in Dare County, North Carolina.

On 13 May 2004, Angela Perez, a reporter for *The Sentinel*, made a request to the Town pursuant to the Public Records Act, seeking to inspect and copy all of the detailed billing statements from the Town Attorney for legal fees incurred during fiscal years 2003-2004. The Town denied the request on the grounds that the documents were not “public records” as that term is defined by our state’s Public Records Act, found in North Carolina General Statutes, section 132-1 *et seq.* The Town contended the documents contained privileged communications between the Town and its attorney, and therefore were exempt from the Public Records Act pursuant to section 132-1.1. The Town provided summaries of the detailed billing statements which included the general nature of each matter handled by the Town Attorney along with the amount of fees paid by the Town on each matter.

Following meetings with various Town officials, on 8 June 2004, the editor of *The Sentinel* wrote a letter to the Kitty Hawk Town Council (“Council”) requesting that the Council authorize the release of redacted copies of the billing statements. The editor noted in her letter that only the Council could waive the Town’s attorney-client privilege, which would be necessary before even redacted copies of the billing statements could be released.

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A special meeting of the Council was called on 17 June 2004, to consider *The Sentinel's* request to obtain redacted copies of the billing statements sent to the Town by the Town Attorney. The Town Attorney recommended the Council waive the attorney-client privilege in all respects with the exception of billing statements for ongoing litigation and billing statements related to claims which were unresolved and might result in future litigation for the Town. During closed session, the Council voted to waive the Town's attorney-client privilege as to written communications from the Town Attorney regarding the requested billing statements, except for billing statements related to litigation.

Redacted copies of the detailed billing statements from the Town Attorney for fiscal year 2003-2004 subsequently were made available to the public. *The Sentinel* obtained copies of the redacted billing statements, and then contended that the copies contained far more redaction and obliteration than the Council's vote directed. On 13 July 2004, *The Sentinel's* editor wrote to members of the Council, notifying them that the billing statements had been redacted to a far greater extent than was directed, and requesting that the Council instruct the Town Manager to release the records in a manner consistent with the Council's 17 June 2004 vote. The Town's Mayor denied *The Sentinel's* request stating that the Council's vote did not authorize the release of privileged communications between the Town and Town Attorney, and that releasing the documents as requested by *The Sentinel* would compromise the Town's ability to prosecute and defend present and future claims.

On 11 August 2004, plaintiff filed a complaint and petition for writ of mandamus, seeking that the trial court order the Town to provide access to, and copies of, the detailed billing records of the Town Attorney for fiscal year 2003-2004, except for those portions as to which the Town asserts its attorney-client privilege in connection with two specific ongoing cases. *The Sentinel* also sought an order declaring that the requested records were in fact public records as a matter of law. In the alternative, *The Sentinel* asked the trial court to order the Town to submit complete and unredacted copies of all detailed billing statements from the Town Attorney for fiscal year 2003-2004 for an *in camera* review for a determination as to whether the attorney-client privilege asserted by the Town was well founded. Plaintiff filed an amended complaint on 10 November 2004, adding a request that the trial court also order the Town to "provide access to and copies of all checks, contracts and/or supporting invoices for

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land purchases, appraisal, demolition, engineering, surveying and other ‘Technical Assistance’ performed for the Town or on the Town’s behalf in conjunction with the Town’s oceanfront condemnations.”

Defendants filed motions seeking to transfer the action to the superior court division and to dismiss the action based upon a lack of subject matter and personal jurisdiction over defendants. Defendants alleged that the confidential information sought by plaintiff constituted written communications to the Town from its attorney regarding claims, and as such, the information was not a public record as defined by North Carolina General Statutes, section 132-1. Defendants argued that sovereign immunity barred plaintiff’s claims. Defendants also filed motions seeking to strike portions of plaintiff’s complaint, dismiss the petition for a writ of mandamus based upon Rule 12(b)(6) of our Rules of Civil Procedure, and dismiss the action for failure to join necessary parties and a lack of standing. Plaintiff’s action was transferred to Dare County Superior Court on 21 December 2004. Defendants also filed several motions seeking to quash subpoenas which were served upon various Town officials.

In an order entered 7 April 2005, defendants’ various motions were denied and defendants were ordered to present the following records for *in camera review* and inspection:

- a. Complete and unredacted detailed billing records provided to the Town of Kitty Hawk by [the Town Attorney] for Fiscal Year 2003-2004.
- b. Complete and unredacted copies of all checks and supporting invoices for land purchases, engineering and surveying related to the oceanfront and other land condemnations.
- c. Complete and unredacted copies of any checks written to Town Attorneys for items and expenses which are not included on their legal billings during the fiscal years indicated above.
- d. Complete and unredacted copies of all contracts and other arrangements by the Town of Kitty Hawk or on its behalf with:
 1. Quible & Associates, P.C.;
 2. Bourne Appraisal Service;
 3. Barnette Integrated Land Services d/b/a/ BILD;
 4. Green Acres Land Development; and/or

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5. Any other firms or individuals who have rendered services connected with the Town of Kitty Hawk's oceanfront and land condemnations since June 1, 2003.

Defendants gave notice of their appeal from the trial court's 7 April 2005 order and filed a motion seeking to stay the submission of the documents for *in camera* review pending the appeal. However, defendants' notice of appeal was dismissed in an order filed 2 May 2005, on the basis that the order denying defendants' motions was not appealable, and that an attempt to appeal from a nonappealable order was a nullity. Defendants then filed their answer on 25 April 2005, and asserted various counterclaims including a declaration from the trial court as to the rights and obligations of the parties, along with an order enjoining plaintiff from continuing its attempts to obtain and misuse confidential information of defendants.

After reviewing the disputed documents *in camera*, the trial court entered its order on 2 June 2005. The trial court held that the records made or received by the Town Attorney, including but not limited to invoices and bills presented to the Town, were presumptively public records as defined by our state's Public Records Act, found in section 132-1 *et seq.* The trial court held that "[s]ubstantive communications from the Town Attorneys to the Town concerning a claim against or on behalf of the Town, or concerning the prosecution, defense, possible settlement or litigation of a judicial action are not public records if they are within the scope of the attorney-client privilege." Defendants were ordered to produce, without redaction, all billing records from the Town Attorney to the Town for fiscal year 2003-2004, with the exception of specific entries which the trial court found were subject to the attorney-client privilege. The trial court also ordered that all contracts made on behalf of the Town related to the oceanfront condemnation cases are public records, and that copies of the contracts must be produced in their entirety, with the exception of one specific document. Defendants were ordered to provide immediate public access to the public records described in the order, with the exception of those documents specifically identified as confidential.

Plaintiff filed a motion seeking to dismiss several of defendants' counterclaims, strike portions of defendants' answer and counter-claims, and order sanctions imposed against defendants. Defendants filed their Notice of Appeal on 7 June 2005, appealing from the trial court's orders entered 7 April 2005, 2 May 2005, and 2 June 2005. Plaintiff subsequently filed a motion to dismiss defendants' 7 June

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2005 Notice of Appeal and sought enforcement of the trial court's 2 June 2005 order. Defendants voluntarily dismissed without prejudice all of their counterclaims on 27 June 2005. On 7 July 2005, the trial court entered an order granting defendants' motion to stay the 2 June 2005 order and other pre-trial proceedings in the case pending defendants' appeal.

On appeal, defendants present four arguments: (1) the trial court erred in finding the detailed billing statements were "presumptively" public records as defined by the Public Records Act; (2) the trial court erred in finding that the contracts were public records as defined by the Public Records Act; (3) the trial court erred in finding that it had subject matter and personal jurisdiction pursuant to the Public Records Act when it ordered defendants to disclose the documents; and (4) the trial court erred in denying defendants' motions to dismiss and strike plaintiff's complaint.

[1] Before addressing the substance of defendants' appeal, we must first address plaintiff's motions to partially dismiss defendants' appeal and plaintiff's motion to dismiss several of defendants' assignments of error for failure to state a legal basis, pursuant to Rule 10(c)(1) of our appellate rules.

On 13 February 2006, plaintiff filed a motion with this Court seeking to partially dismiss defendants' appeal as moot. The basis for plaintiff's motion stems from events occurring after the entry of the 2 June 2005 order and defendants' giving notice of their appeal. On 9 January 2006, the Kitty Hawk Town Council unanimously passed a resolution approving the release of "[u]nredacted copies of all statements for services rendered by the Town Attorney to the Town" for fiscal years 2003-2004 and 2004-2005. Plaintiffs contend that by releasing the disputed documents, unredacted, that defendants have caused their appeal to become moot. On appeal, the primary issue of defendants' argument is that the attorney billing records, in their unredacted state, are not public records subject to disclosure through the Public Records Act. Plaintiff therefore contends that defendants' assignments of error which relate to the trial court's order that defendants release the unredacted billing records should be dismissed as moot.

Defendants counter plaintiff's motion by arguing that while the detailed billing statements were released, they were not released as public records, and thus the issues raised by their appeal are not moot. Defendants argue that they have never treated the billing state-

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ments as public records which are subject to the Public Records Act. Defendants also contend this appeal falls within several of the exceptions to mootness, including the exception that the issues presented are “capable of repetition, yet evading review.” We disagree.

Our courts long have held that

“Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. . . .

Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.”

Pearson v. Martin, 319 N.C. 449, 451, 355 S.E.2d 496, 497 (1987) (quoting *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978), cert. denied, 442 U.S. 929, 61 L. Ed. 2d 297 (1979)). In the instant case, plaintiff sought the release of copies of the unredacted billing statements provided to the Town by the Town Attorney for fiscal year 2003-2004. These documents presented are precisely what the Council released pursuant to the resolution it passed 9 January 2006. Although the resolution specifically stated that the subject communications were “not public records under the Public Records Act,” the relief sought by plaintiff nonetheless was granted. The fact that defendants did not release the unredacted billing statements as “public records” is simply a matter of form over substance, and this does not change the fact that plaintiff has been granted the precise relief sought in its complaint.

Defendants contend that several of the exceptions to the doctrine of mootness apply in the instant case, and therefore we should address the merits of their appeal.¹ Defendants’ arguments regarding

1. Defendants contend the instant case involves an issue which is “capable of repetition, yet evading review.” See *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703, disc. review denied, 356 N.C. 297, 571 S.E.2d 221 (2002). Defendants also contend that the instant case involves a question that is a matter of public interest and that there are adverse collateral legal consequences which may arise if the case is not heard, and that as such, this Court should address the appeal. See *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978) (“matter of public interest” exception); *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) (adverse collateral consequences exception).

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the applicability of the exceptions to mootness are not persuasive. Further, we are bound by this Court's prior holding in *N.C. Press Assoc., Inc. v. Spangler*, 87 N.C. App. 169, 360 S.E.2d 138 (1987). In *Press Association*, the primary issue was whether reports submitted by chancellors of several of our state's public universities were public records and therefore subject to disclosure pursuant to our Public Records Act. During the pendency of the appeal with this Court, the defendant in *Press Association* publicly disclosed the reports which were the subject of the appeal. This Court held that the appeal therefore was moot because the question which originally was in controversy was no longer at issue. *Id.* at 171, 360 S.E.2d at 139. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, as *Press Association* has not been overturned by a higher court, we are bound to follow its precedent.

Were we to reverse the trial court's order with respect to the unredacted detailed billing statements, the reversal would have no effect as the records already have been released. See *In re J.A.G.*, 172 N.C. App. 708, 712, 617 S.E.2d 325, 329 (2005) (quoting *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996)) ("[a] case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.'"). The issues presented by defendants' appeal also are not "capable of repetition, yet evading review" in that, were a situation similar to this one to occur again, there are legal remedies available to address the issue raised by this appeal. A town or other municipality placed in the same position as defendants could simply refrain from releasing the disputed documents, thereby preventing the issue from becoming moot.

Further, the Town asks this Court to make a determination as to whether or not the detailed billing statements are in fact public records subject to disclosure pursuant to the Public Records Act. Deciding this issue would amount to an unnecessary advisory opinion, and this Court does not issue advisory opinions. See *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740, *reh'g denied*, 357 N.C. 582, 588 S.E.2d 891 (2003); *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958); *Carolinas Med. Ctr. v. Employers & Carriers Listed in Exhibit A*, 172 N.C. App. 549, 554, 616 S.E.2d 588, 591 (2005).

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Therefore, the portion of defendants' appeal with respect to the trial court's order that defendants release unredacted copies of the detailed billing statements is dismissed as moot.

[2] We next address plaintiff's motion to dismiss several of defendants' assignments of error for failure to comply with Rule 10(c)(1) of our appellate rules. Appellate Rule 10(c)(1) provides that an appellant must "state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1) (2006). Plaintiff contends defendants' assignments of error numbers nine through twelve fail to state the legal basis upon which the error is assigned. Defendants' assignments of error read:

9. The signing and entry of the trial court's order to the defendants to submit certain documents for an *in camera* review.

R. p. 525 (April 7, 2005 Order)

10. The signing and entry of the trial court's dismissal of defendants' Notice of Appeal of the April 7, 2005 Order.

R. p. 572 (May 2, 2005 Order)

11. The signing and entry of the trial court's subsequent order to defendants to submit documents for an *in camera* inspection.

R. p. 572 (May 2, 2005 Order)

12. The signing and entry of the trial court's order that defendants turn over documents to plaintiff.

R. p. 586 (June 2, 2005 Order)

Defendants contend the assignments of error are sufficient to place both plaintiff and the Court on notice of their issues on appeal, in that further elaboration of the assignments of error would add nothing in terms of putting plaintiff on notice of the legal bases for defendants' assigned errors. Defendants contend assignments of error nine through twelve are sufficient, and that defendants' assignments of error one through six provide the legal bases for why the trial court's entry of the orders listed in assignments nine through twelve were in fact done in error.

Based upon this Court's recent holdings, we hold defendants' assignments of error nine through twelve are insufficient, and must be dismissed. *See Broderick v. Broderick*, 175 N.C. App. 501, 502, 623

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S.E.2d 806, 807 (2006) (dismissed assignment of error which stated simply “Plaintiff-Appellant assigns as error the following: Entry of the Order for Modification of Alimony filed October 7, 2004[,]” with no legal basis given for purported error); *May v. Down E. Homes of Beulaville, Inc.*, 175 N.C. App. 416, 418, 623 S.E.2d 345, 356 (holding broad, vague, and unspecific assignments of error do not comport with the North Carolina Rules of Appellate Procedure), *cert. denied*, 360 N.C. 482, 632 S.E.2d 176 (2006); *Krantz v. Owens*, 168 N.C. App. 384, 388, 607 S.E.2d 337, 341 (2005) (no legal basis stated in assignment of error). As we are bound by precedent, we therefore grant plaintiff’s motion and dismiss defendants’ assignments of error numbers nine through twelve for failure to comply with our Rules of Appellate Procedure.

Thus, the issues that remain on appeal concern only the portion of the trial court’s order pertaining to the release of various contracts and other documents related to the oceanfront condemnation cases. We therefore address only the following remaining questions presented by defendants’ appeal: (1) whether the trial court erred in finding that the contracts were public records as defined by the Public Records Act; and (2) whether the trial court erred in denying defendants’ motions to dismiss and strike plaintiff’s complaint.

[3] Defendants contend the trial court erred in holding that certain records related to the engineering, surveying and other professional services rendered in connection with the Town’s pending oceanfront condemnation litigation were public records. Specifically defendants argue that because the subject documents “were never in the Town’s possession,” they are not public records to which the public should be permitted to have access. In support of their argument, defendants cite section 132-6.2(e) of the Public Records Act, which provides in pertinent part that “Every custodian of public records shall permit any record *in the custodian’s custody* to be inspected and examined.” N.C. Gen. Stat. § 132-6(a) (2005) (emphasis added). Defendants further rely on this Court’s holding in *Durham Herald Co. v. Low-Level Radioactive Waste Mgmt. Auth.*, 110 N.C. App. 607, 430 S.E.2d 441 (1993), in which we held that “records made by contractors and subcontractors [of a governmental agency], kept by the contractors and not actually received by the [Low-Level Radioactive Waste Management] Authority” are not public records under section 132-1 and are not subject to disclosure under the Public Records Act. *Id.* at 610-11, 430 S.E.2d at 444. The Court’s determination was based upon the very specific exclusionary language of North Carolina General

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Statutes, section 104G-6(a)(18) (1991) (repealed by Session Laws 1999-357, s. 4, effective July 1, 2000).² Section 104G-6(a)(18) was a statute of limited applicability, and applied specifically to the powers and duties of the Low-Level Radioactive Waste Management Authority. The Court reasoned that the statute required the Authority to receive certain records generated by its contractors, but placed no timetable on the receipt of the records. *Durham Herald*, 110 N.C. App. at 612-13, 430 S.E.2d at 445. Once the records were received, they would become public, but while they remained with the contractors they would be shielded from scrutiny. *Id.* at 613, 430 S.E.2d at 445. Because of the specificity of this statute, and because we find no similar legislation enacted relative to the work of contractors for municipalities, we find the holding in the *Durham Herald* case unpersuasive in the instant case.

Defendants also argue on appeal that the law firm which was appointed as the Town Attorney acted merely as an independent contractor, not a government official, and that all contracts, surveys, and other documents related to the oceanfront condemnation litigation were created by the firm or created on the Town's behalf at the request of the law firm. Defendants argue that the documents were kept by the firm, and were never delivered to the Town, such that the Town never had the documents in its custody. We hold that not only is this argument without merit, but that it flies in the face of our precedents.

Under our Public Records Act, an analysis of whether documents, held by an entity other than the municipality itself, are subject to disclosure as a public record is two-fold: first, there must be a determination of whether the contractor is an “[a]gency of North Carolina government or its subdivisions”; and second, if a contractor is found to be an agency, whether its records are ‘public records’ that were ‘made or received pursuant to law or ordinance in connection with the transaction of public business. . . .’” *Durham Herald*, 110 N.C.

2. North Carolina General Statutes, section 104G-6(a)(18) (1991) (repealed by Session Laws 1999-357, s. 4, effective July 1, 2000) provided that “To carry out the purposes of this Chapter, the Authority: . . . (18) Shall receive all field data, charts, maps, tracings, laboratory test data, soil and rock samples, and such other records as the Authority deems appropriate, collected or produced by its employees, contractors, or consultants pursuant to siting, operating, or closing of low-level radioactive waste facilities. All such data and materials shall become the property of the State and shall not be disposed of except in accordance with G.S. 132-3 except that soil and rock samples may be subjected to tests and reduced in volume for purposes of storage in a manner approved by the Authority. The Authority may enter into agreements with other State agencies for the purpose of storage and preservation of data and materials[.]”

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App. at 611, 430 S.E.2d at 444 (quoting *Publishing Co. v. Hospital System, Inc.*, 55 N.C. App. 1, 7, 284 S.E.2d 542, 546 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803, 74 L. Ed. 2d 42 (1982)). In the instant case, Vandeventer Black LLP was duly appointed and acted as the Town's attorney pursuant to North Carolina General Statutes, section 160A-173, and defendants admitted as much in their answer to plaintiff's amended complaint. Moreover, defendants conceded on appeal that all defendants, including Vandeventer Black LLP in its capacity as Town Attorney, were public officers of the Town.

An attorney serving as a city attorney is a public officer, in that his position is one created by statute. *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 349, 451 S.E.2d 358, 365 (1994). The Public Records Act specifically provides that the term "Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed)." N.C. Gen. Stat. § 132-1(a) (2005). Therefore, Vandeventer Black LLP was a public officer in that it was duly appointed and acted as the Town Attorney, and thus it constituted an agency of North Carolina government subject to the Public Records Act with respect to its dealings with the Town.

Next we must determine whether the records related to the engineering, surveying and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation are "public records" that were 'made or received pursuant to law or ordinance in connection with the transaction of public business. . . ." *Durham Herald*, 110 N.C. App. at 611, 430 S.E.2d at 444 (citation omitted). Defendants do not dispute that the records related to the engineering, surveying and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation were paid for by the Town, and were made or received in connection with the Town's business. Instead, defendants contend only that the records should be considered to be the private property and work product of Vandeventer Black LLP in preparation for the oceanfront condemnation lawsuits. We disagree.

In North Carolina, anything in a client's file, which is in the hands of the client's attorney, belongs to the client, with the exception only of the attorney's notes or work product. *See* N.C. State Bar Revised Rules of Professional Conduct, Rule 1.16, Comment 10 (2006) ("Generally, anything in the file that would be helpful to succes-

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sor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and canceled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for submission. The lawyer's personal notes and incomplete work product need not be released."); CPR 3 (18 Jan. 1974) (notes that client's file may be turned over to client or new attorney). Therefore, as defendants paid for the records related to the engineering, surveying and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation, defendants own the documents. Moreover, in *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 473, 596 S.E.2d 431, 439-40, *disc. review denied*, 359 N.C. 69, 603 S.E.2d 131 (2004), we held that a City Attorney's work product may be subject to disclosure pursuant to the Public Records Act, as the Legislature has not created a work product exception to the Act's disclosure requirements.³ Allowing defendants to prevail on their argument that these documents were the private property of the Town Attorney, and not property of the Town itself, would be permitting the Town to place documents such as these in the hands of a so-called independent contractor in order to escape the public records disclosure requirements. If an argument such as this were to prevail there would be nothing to prevent municipalities and other governmental agencies from skirting the public records disclosure requirements simply by hiring independent contractors to perform governmental tasks and to have them retain all documents in conjunction with the performance of those tasks that municipalities and agencies chose to shield from public scrutiny.

Therefore, as defendants have not disputed the fact that the Town paid for the records related to the engineering, surveying and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation, or that the records were made or received in connection with the transaction of public business, we hold the trial court did not err in finding the records constituted public records and in ordering the release of the subject records.

3. The Public Records Act has been amended in the wake of *McCormick*. However, the amendment to the statute was subsequent to the controversy that gave rise to this appeal. See N.C. Gen. Stat. § 132-1.1 (2005).

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[4] Defendants next argue the trial court erred in failing to dismiss plaintiff's petition for a writ of mandamus. Defendants contend the records at issue in this case are not public records, and therefore it was in the Town's discretion as to whether or not to release them. Defendants support their argument by stating that a writ of mandamus is a remedy that is appropriate only when a party seeks to compel a public official "to perform a purely ministerial duty imposed by law." *Hospital v. Wilmington*, 235 N.C. 597, 600, 70 S.E.2d 833, 835-36 (1952). A party seeking such a writ must have a clear legal right to demand it, "and the . . . person must be under a present, clear, legal duty to perform the act sought to be enforced." *Id.* at 600, 70 S.E.2d at 836.

Defendants contend the records related to the oceanfront condemnation litigation are not public records, and therefore plaintiff had no legal right to demand them and the Town had no legal duty to release them. We disagree. As we have held that the subject records are in fact public records subject to the disclosure requirements of the Public Records Act, plaintiff therefore was entitled to seek the release of the records pursuant to the Public Records Act. Thus, the trial court acted properly in denying defendants' motion to dismiss plaintiff's petition for a writ of mandamus.

[5] Defendants also argue the trial court erred in denying its motion to strike portions of plaintiff's amended complaint pursuant to Rule 12(f) of our Rules of Civil Procedure. Defendants contend certain allegations in plaintiff's amended complaint, related to the Town's initial release of the redacted billing statements, "are irrelevant, immaterial and impertinent in that they directly contradict or are not supported by the official records of the Town of Kitty Hawk."

Rule 12(f) permits a trial court to "order stricken from any pleading any . . . redundant, irrelevant, immaterial or scandalous matter." N.C. Gen. Stat. § 1A-1, Rule 12(f) (2005). "The purpose of Rule 12(f) is to avoid expenditure of time and resources before trial by removing spurious issues." *Estrada v. Jaques*, 70 N.C. App. 627, 642, 321 S.E.2d 240, 250 (1984). Unless an allegation in a complaint has no possible bearing upon the litigation, matters alleged in the complaint should not be stricken. *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 316, 248 S.E.2d 103, 108 (1978). "If there is any question as to whether an issue may arise, the motion should be denied." *Id.*

In the instant case, the allegations in plaintiff's complaint questioned the Town's compliance with the Public Records Act and the

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Town's resolution, not the accuracy of the Town's meeting minutes or records themselves. Plaintiff's allegations do not "ignore the official minutes and records of the Town Council," as alleged by defendants. As the substance of plaintiff's allegations were relevant and material to plaintiff's claims, we hold the trial court did not err in denying defendants' motion to strike portions of plaintiff's amended complaint.

[6] Finally, defendants contend the trial court erred in denying their motion to dismiss plaintiff's complaint based upon a lack of standing and failure to join necessary parties. Defendants argue that the reporter for *The Sentinel* who made the initial public records request is the only person entitled to seek enforcement of her public records request. Defendants further contend the reporter and the Town Clerk, whom defendants contend is the official custodian of the Town's records, are necessary parties, and without their joinder plaintiff's action must be dismissed.

"A necessary party is one who 'is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence.' " *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438-39, 527 S.E.2d 40, 44 (2000) (quoting *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968)).

Defendants argument that the reporter who made the initial request is the only party who is entitled to seek enforcement of the public records request is based upon wording found in *City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186, 192, 600 S.E.2d 872, 876 (2004) ("[O]nly the person making the public records request is entitled to initiate judicial action to seek enforcement of its request." (quoting *McCormick*, 164 N.C. App. at 464, 596 S.E.2d at 434)). However, we find defendant's argument to be misplaced. Both *City of Burlington* and *McCormick* dealt with the issue of whether a governmental entity could file a declaratory action. Both cases held that our Public Records Act does not permit governmental entities to use a declaratory judgment action to determine the entities' rights under the Public Records Act. We held that only the party making the public records request may bring an action to enforce the Public Records Act and determine the rights of all parties under the Act. See *City of Burlington*, 166 N.C. App. at 192, 600 S.E.2d at 876; *McCormick*, 164 N.C. App. at 464, 596 S.E.2d at 434. In the instant case, the reporter made the initial public records request in her

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capacity as a reporter for *The Sentinel* and on behalf of plaintiff. Thereafter plaintiff's editor made the official written requests to the Town's Council and other Town officers, all of which were done in her capacity as editor of *The Sentinel* and on behalf of plaintiff. Thus, the party on behalf of which the request was made was a party to the action.

North Carolina General Statutes, section 132-6 provides that “[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.” N.C. Gen. Stat. § 132-6(a) (2005). Pursuant to section 160A-171, the office of the town clerk “shall . . . be the custodian of all [town] records.” N.C. Gen. Stat. § 160A-171 (2005); *see also*, N.C. Gen. Stat. § 132-2 (2005) (“The public official in charge of an office having public records shall be the custodian thereof.”). As custodian of the Town's records, the town clerk does not have discretion to prevent inspection and copying of materials which constitute public records under our Public Records Act. *See* N.C. Gen. Stat. § 132-6(a) (2005); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 465, 515 S.E.2d 675, 686 (1999). However, the town clerk does not have the authority to declare certain documents to be public records without the Council's waiver of privilege and authorization to release the documents. Plaintiff included as parties to the action all town officials involved in the matter who had the authority over, and responsibility for determining whether the requested records constituted public records, and who ultimately were responsible for the Town's compliance with the Public Records Act. The Town Council was the governing body that had the authority to waive the Town's attorney-client privilege and instruct the town clerk as to whether or not the requested records could be disclosed. Based upon the Town's argument that the withheld documents fell within an exception to the Public Records Act, the town clerk lacked the authority to release the requested documents without the approval of the Council.

In addition, the policy underlying our Public Records Act is designed to give liberal access to public records, *see News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992); *McCormick*, 164 N.C. App. at 463, 596 S.E.2d at 434, and to construe the statute so narrowly as to require the town clerk, to be a necessary party would be in contravention of the statute's intent.

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Having named the Town through the Town Council, the Mayor, the individual Town Council members, the Town Manager, and the Town Attorneys as parties to this suit, and given the nature of the documents involved, we cannot hold the town clerk constitutes a necessary party without whom a valid judgment cannot be rendered in this action completely and finally determining the controversy.

As plaintiff has complied with the requirements of our Rules of Civil Procedure, and has included all necessary parties in the action, we hold the trial court acted properly in denying defendants' motion to dismiss plaintiff's complaint for a lack of standing and for failure to join necessary parties pursuant to Rule 12(b)(7) of our Rules of Civil Procedure.

Dismissed in part; affirmed in part.

Judges CALABRIA and GEER concur.

JAMES WILLIAMS, PLAINTIFF v. CHRISTOPHER VONDERAU, DEFENDANT

No. COA05-1549

(Filed 2 January 2007)

Appeal and Error— mootness—order expiring before appeal heard

An appeal from a civil no-contact order was dismissed as moot where the appeal was heard almost five months after the order ceased to be effective.

Judge TYSON dissenting.

Appeal by Defendant from order issued 8 August 2005 by Judge Shelly S. Holt in District Court, New Hanover County. Heard in the Court of Appeals 12 September 2006.

James E. Williams, plaintiff-appellee.

Bruce A. Mason and Samantha K. Stokes, for defendant-appellant.

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WYNN, Judge.

“A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.”¹ Here, Defendant appeals from a Chapter 50C Civil No-Contact Order, effective 7 April 2005 for a period of one year. The appeal was heard before this Court 12 September 2006, almost five months after the order ceased to be effective. For this reason, we find the issue is moot and accordingly dismiss.

The facts of the case were that at an 8 April 2005 hearing on this matter, Plaintiff James Williams testified that on 15 February 2005 Defendant Christopher Vonderau and his wife, along with several people who lived in the neighborhood, came to the edge of Williams’ property, while Vonderau repeatedly demanded Williams come out and face him. Vonderau stated, “[c]ommit some more felonies, sell some more drugs, don’t you have anything better to do.”

At the hearing, Williams and his wife recited, without objection, details of the 15 February incident, where Vonderau stood in front of Williams’ house yelling insults, racial slurs and challenges to confrontation. Williams testified that Vonderau “lived up the street” and would “come down and harass” him and his family. Williams stated, “We’re slowly building the house and they don’t want blacks in their neighborhoods and they keep coming down harassing us.” Mrs. Williams also testified, regarding the conduct of Vonderau and his wife. She stated, “it’s just been horrible. They’ve been stalking and harassing our family for years. . . . We definitely need an order for them to stay away. I don’t even know why they wouldn’t want to stay away. Why would they want to keep coming around us.” The Williamses also testified, at length, regarding other incidents of confrontation with Vonderau and his wife.

The trial court heard testimony of a 2004 confrontation between Williams and the Vonderaus’ children. Following a complaint from Mrs. Vonderau, Williams was charged with two counts of assault and communicating threats. Williams was not convicted of either charge. Further testimony indicated that Vonderau later prompted Building Code Enforcement officials to inspect the Williams’ house to determine if the Williamses were occupying the house before a certificate of occupancy had been issued.

1. *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (citation and quotation omitted).

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Following the hearing, the trial court issued a civil no-contact order in favor of Williams which ordered that:

1. The defendant not visit, assault, molest, or otherwise interfere with plaintiff.
2. The defendant cease stalking the plaintiff.
3. The defendant cease harassment of the plaintiff.
4. The defendant not abuse or injure the plaintiff.
5. The defendant not contact the plaintiff by telephone, written communication, or electronic means.
6. The defendant not enter or remain present at the plaintiff's residence, place of employment, or other places listed below at times when the plaintiff is present.

On 18 April 2005, Vonderau filed a Rule 59 motion for a re-hearing. On 8 August 2005, the trial court heard arguments, denied the motion, and on 25 August 2005 entered its judgment. From the trial court's order denying a re-hearing, Vonderau appealed.

On appeal, Vonderau raises several arguments regarding the validity of the underlying civil no-contact order; however, we must dismiss this matter as moot.

“A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.” *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (quotation and citation omitted). And, if an issue is determined to be moot at any time during the course of the proceedings, the usual response should be to dismiss the matter. *See N.C. Press Assoc. v. Spangler*, 87 N.C. App. 169, 170-71, 360 S.E.2d 138, 139 (1987).

Vonderau appeals from the civil no-contact order, taking effect 8 April 2005 and initially effective for a period of one year [R. 13-14]. We note the case was calendared for hearing before this Court 10 September 2006, more than five months after the civil no-contact order ceased to be effective. This raises the possibility that the issues Vonderau raised are moot; if so, this Court should dismiss the matter. *See Id.* at 171, 360 S.E.2d at 139.

Under Chapter 50C of the North Carolina General Statutes, a civil no-contact order may be renewed without the requirement an unlawful act be committed after entry of the current order.

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The court may renew an order, including an order that previously has been renewed, upon a motion by the complainant filed before the expiration of the current order. The court may renew the order for good cause. . . . If the motion for extension is uncontested and the complainant seeks no modification of the order, the order may be extended if the complainant's motion or affidavit states that there has been no material change in relevant circumstances since entry of the order and states the reason for the requested extension.

N.C. Gen. Stat. 50C-8(c) (2005).

The record before us contains no information the original order has been extended or that an extension has been sought. Absent evidence of an extension, the matter appears to no longer be in controversy. As such, the matter is moot. *See State ex rel Rhodes v. Gaskill*, 325 N.C. 424, 383 S.E.2d 923 (1989).

We conclude the order from which Vonderau appealed is no longer effective and was not effective at the time the case was heard before this Court. Accordingly, we dismiss Vonderau's appeal as moot.²

We note that even if this matter was not considered moot, Vonderau only gave notice from the denial of his Rule 59 motion to set aside an underlying order. *See Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114 (2006). Notwithstanding the mootness of this appeal, we reviewed Vonderau's claim for a new trial under Rule 59 and determined that his appeal, even if it was properly before us, is without merit.

2. This Court has previously addressed appeals past the expiration of the underlying order where the defendant may have suffered collateral legal consequences from the entry of the court order—*e.g., Smith v. Smith*, 145 N.C. App. 434, 549 S.E.2d 912 (2001) (domestic violence protective order may have been considered in a child custody action involving the defendant) or the stigma attached to a judicial determination that subjects a defendant to a court order is so great the expired court order has continued legal significance—*e.g., Wornstaff v. Wornstaff*, — N.C. App. —, 634 S.E.2d 567 (2006) (“[A] defendant’s appeal of an expired domestic violence protective order is not moot because of the stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse and the continued legal significance of an appeal of an expired domestic violence protective order.”). Here, the Defendant was under a “no contact order” that has now expired. Surely, we could speculate that any court action *could* be considered by potential employers as well as anyone else. That, however, is not a collateral legal consequence that merits an exception to the doctrine of mootness.

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Dismissed.

Judge HUDSON concurs.

Judge Tyson dissents in a separate opinion.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

TYSON, Judge, dissenting.

The majority's opinion erroneously: (1) dismisses Christopher Vonderau's ("defendant") appeal as moot; and, (2) concludes that defendant's appeal, if not moot, is without merit. I vote to reach the merits of defendant's appeal and to reverse the trial court's order. I respectfully dissent.

I. Background

On 7 March 2005, James Williams ("plaintiff") filed a complaint against defendant for a civil no-contact order for stalking. Plaintiff alleged defendant came to his residence on 15 February 2005 and threatened him with bodily injury. Plaintiff sought a permanent no-contact order. Plaintiff asked the trial court to order defendant to: (1) stop stalking him; (2) cease harassing him; and (3) refrain from entering or remaining present at his residence, school, or place of employment.

On 8 April 2005, a hearing was held at which both parties testified and presented evidence. During the hearing, the trial court expressly stated, "the 'or otherwise harassed' [portion of N.C. Gen. Stat. § 50C-1(6) (2005)], the way it was written, doesn't require the more than one occasion that the stalking does require." The trial court issued a civil no-contact order in plaintiff's favor.

On 18 April 2005, defendant moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. Defendant based his motion, in part, upon plaintiff presenting insufficient evidence to justify entry of the judgment and "the judgment is contrary to the prevailing law." On 8 August 2005, the trial court heard and denied defendant's motion in open court.

Defendant timely appealed the trial court's denial of his motion for a new trial and argues the trial court's interpretation of N.C. Gen.

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Stat. § 50C-1 was erroneous as a matter of law. I agree, vote to reverse, and respectfully dissent.

II. Mootness

The majority's opinion dismisses defendant's appeal as moot on the grounds: (1) the civil no-contact order became effective on 8 April 2005 and expired on 8 April 2006; (2) this case was not heard by this Court until 10 September 2006, five months after the civil no-contact order ceased to be effective; and (3) the record before us contains no information the order has been extended or that plaintiff has sought an extension. I disagree.

This Court has not previously addressed when an appeal from a civil no-contact order for stalking issued pursuant to N.C. Gen. Stat. § 50C-1 is considered moot. We have addressed the issue of whether an appeal from an expired domestic violence protective order issued pursuant to N.C. Gen. Stat. § 50B-1 is moot. This Court stated:

[W]e note that the domestic violence protective order in this case [has] expired[.] Generally, when an issue is no longer in controversy, the appeal is dismissed as moot. [A]n appeal should be dismissed as moot when . . . the underlying controversy . . . cease[s] to exist. [W]hen the relief sought has been granted or . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law[.] However this Court has held that a defendant's appeal of an expired domestic violence protective order is not moot because of the stigma that is likely to attach to a person judicially determined to have committed [domestic] abuse and the continued legal significance of an appeal of an expired domestic violence protective order. Thus, we address the merits of . . . [the] appeal.

Wornstaff v. Wornstaff, 179 N.C. App. 516, 518, 634 S.E.2d 567, 568 (2006) (Wynn, J.) (internal citations and quotations omitted).

This Court has also stated another exception to the mootness doctrine:

[A] case which is capable of repetition, yet evading review may present an exception to the mootness doctrine.

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There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04, *disc. rev. denied*, 356 N.C. 297, 571 S.E.2d 221 (2002) (internal quotations and citations omitted).

This Court has found a continuing stigma is likely to attach to a person who has been judicially determined to have committed domestic abuse. *Wornstaff*, 179 N.C. App. at 518, 634 S.E.2d at 568. This same stigma is also likely to attach to a person who has been judicially found to have stalked or harassed another. Potential collateral and future consequences exist for a person who has been judicially determined to have stalked another. This Court stated:

[T]here are numerous non-legal collateral consequences to entry of a domestic violence protective order that render expired orders appealable. For example, a Maryland appellate court in addressing an appeal of an expired domestic violence protective order, noted that a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a[n] [order].

Smith v. Smith, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001) (internal citation and quotation omitted). The same rationale applies to someone who has been judicially determined to have stalked or harassed by another person. A potential employer or institution may consider whether a protective order has been entered against an applicant in evaluating an applicant's fitness and ability to work in harmony with others. *Id.*

The majority's opinion erroneously dismisses defendant's appeal as moot. A permanent civil no-contact order may not exceed one year in length. N.C. Gen. Stat. § 50C-8(b) (2005). The majority's opinion effectively bars any appellate review of these orders. Based solely upon the time elapsed between entry of the trial court's order and the matter being heard by this Court, appeals from these orders cannot be reviewed under the majority's holding. Because the appeal is not moot, I vote to reach the merits of defendant's appeal.

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III. Standard of Review

This Court has stated:

The determination of whether to grant or deny a motion pursuant to either Rule 59(a) or Rule 59(e) is addressed to the sound discretion of the trial court. *Where errors of law were committed, . . . the trial court is required to grant a new trial.* While our standard of review under Rule 59(e) is abuse of discretion, *under Rule 59(a)(7) our review is de novo.*

Young v. Lica, 156 N.C. App. 301, 304, 576 S.E.2d 421, 423 (2003) (internal citations and quotations omitted) (emphasis supplied); *see Kinsey v. Spann*, 139 N.C. App. 370, 372, 533 S.E.2d 487, 490 (2000) (“Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion. However, where the motion involves a question of law or legal inference, our standard of review is *de novo*.” (internal citations omitted)).

Defendant’s motion for a new trial was based upon plaintiff’s failure to present sufficient evidence to support the judgment and “the judgment [being] contrary to the prevailing law.” N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) provides that a new trial may be granted when there is “insufficie[nt] . . . evidence to justify the verdict or that . . . verdict is contrary to law.”

Defendant moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(a)(7). “[W]e review the trial court’s denial of the motion for a new trial under Rule 59(a)(7) under a *de novo* standard.” *Young*, 156 N.C. App. at 304, 576 S.E.2d at 423.

IV. N.C. Gen. Stat. § 50C, et seq.

Plaintiff filed a complaint against defendant for a civil no-contact order for stalking. Defendant argues the trial court erred on a matter of law when it interpreted N.C. Gen. Stat. § 50C-1(6). Defendant correctly asserts this statute does not allow entry of a civil no-contact order for stalking based upon a single incident of “harassing.”

N.C. Gen. Stat. § 50C-1(6) defines stalking as:

Following on more than one occasion or otherwise harassing, as defined in G.S. 14-277.3(c), another person without legal purpose with the intent to do any of the following:

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a. Place the person in reasonable fear either for the person's safety or the safety of the person's immediate family or close personal associates.

b. Cause that person to suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment and that in fact causes that person substantial emotional distress.

(Emphasis supplied). This Court has not previously interpreted N.C. Gen. Stat. § 50C-1(6), which became effective on 1 December 2004. However, N.C. Gen. Stat. § 14-277.3(c) is specifically referred to in N.C. Gen. Stat. § 50C-1(6), which incorporates the definition of criminal stalking by reference. We have interpreted and applied N.C. Gen. Stat. § 14-277.3(c) in previous cases.

N.C. Gen. Stat. § 14-277.3 (2005) states “a person commits the [criminal] offense of stalking if the person wilfully *on more than one occasion* follows or is in the presence of, or otherwise harasses another person.” (Emphasis supplied). Prior precedent interpreting N.C. Gen. Stat. § 14-277.3 holds that the “on more than one occasion” language applies to the “otherwise harasses” language of the statute.

In *State v. Watson*, this court upheld a stalking conviction when the defendant became “very clingy and possessive,” called the victim *multiple times*, and accused the victim of making sexual advances toward her. 169 N.C. App. 331, 338, 610 S.E.2d 472, 477 (2005) (emphasis supplied). This Court held, “it is clear the General Assembly intended to prevent a person from willfully stalking another *at more than one particular time*.” *Id.* (emphasis supplied).

In *State v. Thompson*, this Court upheld a stalking conviction and concluded “there was sufficient evidence from which the jury could find that defendant followed or was in the presence of [the victim] *on more than one occasion* without legal purpose and with the intent to cause her emotional distress by placing her in fear of death or bodily injury.” 157 N.C. App. 638, 643-44, 580 S.E.2d 9, 13, *disc. rev. denied*, 357 N.C. 469, 587 S.E.2d 72 (2003) (emphasis supplied).

During the hearing on 8 August 2005, the trial court expressly stated, “the ‘or otherwise harassed’ [portion of N.C. Gen. Stat. § 50C-1(6)], . . . , doesn’t (sic) require the more than one occasion that the stalking does require.” Defendant correctly argues the “on more than one occasion” language of N.C. Gen. Stat. § 50C-1(6) applies to the stalking language of the statute and to the “otherwise

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harassing as defined in G.S. § 14-277.3(c)" portion of the statute. The trial court's entry of order is based upon a single act and is a misapprehension of law.

The trial court's interpretation of N.C. Gen. Stat. § 50C-1 was erroneous as a matter of law. *See Young*, 156 N.C. App. at 304, 576 S.E.2d at 423 ("Where errors of law [are] committed, . . . the trial court is required to grant a new trial."). I vote to reverse the trial court's order denying defendant's motion and remand for a new trial.

IV. Conclusion

A defendant's appeal of an expired civil no-contact order for stalking is not moot because the issue before us "is capable of repetition, yet evad[es] review," *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 703, and because of the continuing stigma that is likely to attach to a person judicially determined to have stalked another, *Wornstaff*, 179 N.C. App. at 518, 634 S.E.2d at 568. The statute expressly limits the duration of these orders "for a fixed period of time not to exceed one year." N.C. Gen. Stat. § 50C-8(b).

Under *de novo* review, the trial court erred as a matter of law when it interpreted N.C. Gen. Stat. § 50C-1(6) to justify issuance of a permanent no-contact order based upon a single incident of "harassing." The trial court's order is based upon a misapprehension of law. I vote to reverse the trial court's order denying defendant's motion and remand for a new trial. I respectfully dissent.

STATE OF NORTH CAROLINA v. TERRY J. BURGESS AKA
TERRY JOEL COOPER BURGESS

No. COA05-1529

(Filed 2 January 2007)

1. Appeal and Error— evidence objection not renewed at trial—statute then presumed constitutional

An assignment of error regarding videotapes was reviewed on appeal even though defendant did not object when the videotapes were offered into evidence. At the time, an evidence rule (N.C.G.S. § 8C-1, Rule 103(a)(2) (2005)) that did not require renewal of an objection was presumed constitutional.

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2. Constitutional Law— right to confrontation—videotapes of interviews—declarants available for cross-examination

There was no violation of defendant's right to confrontation in the admission of videotapes of interviews between child sexual abuse victims and nurses where the children took the stand and were available for cross-examination.

3. Evidence— hearsay—videotapes of interviews with nurses—medical diagnosis exception

Videotapes of interviews between child sexual abuse victims and nurses satisfied the requirements of the hearsay exception for medical diagnosis and treatment. N.C.G.S. § 8C-1, Rule 803(4).

4. Evidence— hearsay—excited utterance exception—child's statements to mother

A child sexual abuse victim's statements to her mother were properly admitted as an excited utterance. Fewer than twenty-four hours had passed between the time the child's mother yelled at her for putting dolls in a suggestive position, the assault, and the child's statements to her mother.

5. Evidence— opinion about victim's credibility—child sexual abuse—testimony that victim suffering from post-traumatic stress

There was no plain error in allowing a licensed clinical social worker to testify that a child sexual abuse victim was suffering from post-traumatic stress or trauma related to abuse. The State presented physical evidence supporting a diagnosis of abuse, and the court instructed the jury that expert opinion that a person suffers from post-traumatic stress may be considered as corroboration and not as substantive evidence.

6. Constitutional Law— right to unanimous verdict—multiple instances of child sexual abuse

Defendant's right to a unanimous verdict was not violated in a prosecution for multiple counts of first-degree sexual offense of a child where the dates and locations of the acts alleged were not included on the verdict sheets.

7. Witnesses— children—competency

There was no plain error in allowing the victims of child sexual abuse to testify where they each took the stand outside the presence of the jury and were questioned by the State and the

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trial court, each demonstrated an ability to distinguish between the truth and a lie, stated that it was good to tell the truth and bad to lie, and understood that telling a lie led to punishment. The court made detailed findings as to their competency.

8. Sexual Offenses—against child—indictment—specific sexual act not alleged—language of statute

A superceding indictment for sexual offense against a child was sufficient where it conformed to the language of N.C.G.S. § 14-27.4(a)(1) even though it did not specify the sexual act of which defendant was found guilty.

9. Sexual Offenses—penetration—evidence sufficient

There was sufficient evidence of penetration in a prosecution for first-degree sexual offenses against children and the trial court did not err by refusing to dismiss the charges.

10. Sexual Offenses—first-degree—instruction on attempt not given—not supported by evidence

The trial court did not err by not instructing the jury on attempted sexual offense in a prosecution for first-degree sexual offenses against children. No evidence presented at trial would support a jury finding of attempted sexual offense.

Appeal by Defendant from judgments dated 21 May 2004 by Judge W. David Lee in Superior Court, Cabarrus County. Heard in the Court of Appeals 10 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Chris Z. Sinha, for the State.

M. Alexander Charns for Defendant-Appellant.

McGEE, Judge.

Terry J. Burgess (Defendant) was convicted of six counts of first-degree sexual offense of a child under the age of thirteen years and sentenced to three consecutive sentences of a minimum of 288 months and a maximum of 355 months in prison. Defendant appeals.

Prior to trial, Defendant moved to suppress certain videotaped interviews between pediatric nurses and the victims as inadmissible hearsay. The trial court denied Defendant's motion, and found the videotaped interviews admissible as statements made to obtain

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medical diagnosis or treatment pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4).

At trial, the State's evidence tended to show the following. S.V. and V.V., both minors, lived with their parents, A.V. and F.V., in Cabarrus County. In June 2002, A.V.'s sister, S.P., S.P.'s two minor children, Y.V. and A.P., and Defendant relocated to North Carolina from Tennessee. They moved in with A.V. and her family. Defendant is not the father of Y.V. and A.P., and the children referred to Defendant as "Bird" or "Uncle Bird." For a time while the two families were living together, Defendant was the only adult not employed outside the home. In mid-September 2002, Defendant, S.P., Y.V., and A.P. rented a nearby mobile home. S.P. continued to work outside the home and Defendant remained unemployed. Defendant watched Y.V. and A.P., and during September and October 2002, A.V. and F.V. paid Defendant to babysit V.V.

S.P. observed Y.V. placing her dolls in a suggestive position in April 2003 and made an appointment for Y.V. and A.P. at the Children's Advocacy Center at NorthEast Medical Center (the Children's Center). Defendant was later arrested and charged with eight counts of first-degree sexual offense. S.V. and V.V. were also seen at the Children's Center shortly thereafter.

At trial, the State offered the testimony of S.P. to explain the incident which led her to take Y.V. and A.P. to the Children's Center. Defendant objected to this testimony as inadmissible hearsay. After a *voir dire* hearing outside the presence of the jury, the trial court concluded the testimony was admissible as an excited utterance under N.C. Gen. Stat. § 8C-1, Rule 803(2). S.P. testified before the jury that while she was in the car with Y.V. one evening in late April 2003, S.P. saw Y.V. position the head of one of her dolls near the genitalia of another doll. S.P. told Y.V. not to do that because it was "nasty[.]" The following morning, S.P. asked Y.V. if "anybody was touching her privates[.]" Y.V. replied that "Bird" was in Y.V.'s room the night before and that he "had touched her private and rubbed it" and that "he scared her." When questioned by A.V. later in the day, Y.V. said "Bird" had "rubbed her privates" the night before while her mother was sleeping.

The State proffered the testimony of Y.V. After *voir dire*, the trial judge found Y.V., who was five years old at the time of trial, competent to testify. However, the trial court stated that it did not believe that Y.V. would be able to assist the jury with any substantive issues.

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The State called Y.V. to the stand in the presence of the jury to demonstrate her competency. While on the stand, Y.V. stated her age, counted to eleven, recited the alphabet, and demonstrated an ability to determine whether certain statements were the truth or lies. Defendant did not ask any questions of Y.V.

Cindy Fink (Nurse Fink), a nurse with the Children's Center, testified that she interviewed Y.V. before Y.V. was examined by the pediatrician. Nurse Fink testified that during this interview, Y.V. was informed that she was at the Children's Center for a check up with the doctor. Nurse Fink further testified that when she showed Y.V. a picture of a little girl, Y.V. indicated genitalia on the picture as her "privates" and told Nurse Fink that "Bird" had "rubbed it." Y.V. also said that "someone" had touched her on her "hiney." A videotape of Nurse Fink's interview with Y.V. was shown to the jury.

The State also proffered the testimony of S.V., who was eight years old at the time of trial. The trial court found S.V. to be a competent witness. S.V. identified Defendant as "Bird" while on the witness stand, and testified that "Bird" touched her on her "private . . . [i]n the bathroom" of her house. S.V. testified she did not remember seeing Defendant touch her brother, V.V., or her cousins, Y.V. and A.P. Defendant asked no questions of S.V.

Sheri Cook (Nurse Cook), a nurse with the Children's Center, testified that she interviewed S.V. before S.V. was examined by the pediatrician. In the interview, S.V. stated that she "wanted Uncle Bird to stop bad stuff like touching privates." A videotape of the interview was shown to the jury. During the recorded interview with Nurse Cook, S.V. said no one ever touched her "private parts," but then also said Defendant only touched Y.V.'s "privates." When asked how she knew that, S.V. replied that "[her] mind just told [her]."

The State attempted to admit into evidence a second videotaped interview, recorded six days after S.V.'s initial visit to the Children's Center, as a recorded recollection, or alternatively, pursuant to the residual hearsay exception. At this second interview, a police detective was present and spoke with S.V. The trial court denied the State's request to admit the second videotape.

Detective Carlos Roger Landers (Detective Landers), an investigator with the Concord Police Department, testified that he interviewed S.V. When Detective Landers asked S.V. if Defendant had touched her, S.V. nodded her head affirmatively, and pointed to her vaginal area.

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V.V., four years old at the time of trial, was also found to be a competent witness by the trial court. V.V. testified that "Bird" touched him on his "private" in the bathroom of V.V.'s house, and V.V. identified "Bird" as Defendant in the courtroom. T.275-76. Defendant asked no questions of V.V.

Julie Brafford (Nurse Brafford), a nurse with the Children's Center, interviewed V.V. before V.V. was examined by the pediatrician. During the interview, V.V. told Nurse Brafford that "Uncle Bird peed on [V.V.'s] back and butt and [that it] tickled." V.V. also said that "Uncle Bird" touched him on his "winkie" and his "butt" in the bathroom of their house. While demonstrating his knowledge of body parts, V.V. named his genitalia "winkie" and his buttocks "hiney or butt." A videotape of the interview was played for the jury.

Patricia Mahaney (Mahaney), a licensed clinical social worker with NorthEast Psychiatric and Psychological Institute, testified for the State as an expert in the counseling and behavior of sexually abused children. Mahaney observed S.V. at a number of counseling sessions from June 2003 through August 2003, and testified that in her opinion S.V. exhibited some characteristics of post-traumatic stress, "the technical name for trauma related to abuse" and S.V.'s behavior was consistent with a child who had been sexually abused. Mahaney testified that she also saw V.V. during this time and that he told her that "Uncle Bird" had touched his "privates, [his] winkie and [his] butt[,] at more than one of their sessions. Mahaney also offered her opinion that V.V.'s behavior was consistent with a child who had been sexually abused.

Dr. Carol Soucie (Dr. Soucie), a pediatrician with Piedmont Pediatric Clinic, testified for the State as an expert in general pediatrics. Dr. Soucie examined Y.V., S.V., and V.V. after each child was interviewed by a nurse. Dr. Soucie also examined A.P. who was not interviewed by a nurse because he was not yet verbal. Dr. Soucie testified that her examination of Y.V. revealed no abnormal findings, except during Y.V.'s genital exam. Dr. Soucie found bruising around Y.V.'s vaginal opening, thickened areas of Y.V.'s hymen, and small scars at two different positions on Y.V.'s anus. Dr. Soucie testified that these physical findings were consistent with sexual abuse and that in her opinion there "was definite abuse." Dr. Soucie's examination of S.V. revealed that S.V.'s vaginal area had "an area that was very thinned out and irregular as well as areas that were thickened from which we see oftentimes with repeated penetration." Dr. Soucie also observed scars on S.V.'s perianal area that Dr. Soucie estimated were

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approximately three to four months old. Dr. Soucie testified that the physical findings from her examination of S.V. were consistent with sexual abuse. As to V.V., Dr. Soucie observed a scar in V.V.'s anus and a "persistent kind of like a divot in the perianal area" which she attributed to repeated penetration. Dr. Soucie testified that these physical findings were "definitely" consistent with anal penetration and repeated sexual abuse.

Defendant testified that he moved with S.P. to the home of A.V. and F.V., and that he helped to take care of the children. He denied ever being alone with S.V. and V.V. After Defendant and S.P. moved to their own home, Defendant watched Y.V. and A.P. for a short period of time before he began working with a roofing company from 5:00 a.m. to 7:00 p.m. In January 2003, Defendant began a new position with hours from 8:00 a.m. to 3:00 p.m., which he held until he was arrested. Defendant denied ever being alone with S.V. and V.V. during the time he lived in their home. Defendant denied doing anything of an improper or sexual nature to any of the children.

At the close of all the evidence, Defendant moved to dismiss each of the charges for insufficient evidence. The trial court denied the motion as to the charges pertaining to Y.V., S.V., and V.V., but granted the motion as to the charges pertaining to A.P. At the charge conference, Defendant requested an instruction on the lesser included offense of attempted sexual offense against a child. The trial court concluded that there was no substantial evidence, either direct or circumstantial, from which a jury could infer attempted sexual offense and therefore refused to give the instruction.

Defendant first argues that his Sixth Amendment confrontation rights were violated when the trial court denied his motion to suppress the videotaped interviews between the nurses at the Children's Center and Y.V., S.V., and V.V. Defendant argues the statements of the children are testimonial in nature and barred by *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004). Further, Defendant urges that the videotaped statements are inadmissible hearsay not properly admitted as statements made for the purpose of medical diagnosis or treatment pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4). We disagree.

In *Crawford*, the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68, 158 L. Ed. 2d at 203. The Supreme

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Court also noted, however, that “when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.” *Id.* at 59-60 n.9, 158 L. Ed. 2d at 197-98 n.9. Thus, to be barred by *Crawford*, the evidence offered must be testimonial, the declarant must be unavailable, and the defendant must have had no prior opportunity for cross-examination.

[1] The State first argues that Defendant failed to properly preserve this issue for our review because Defendant failed to object when the videotapes were offered into evidence. We disagree. At the time of Defendant’s pre-trial motion, the General Assembly had passed N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2005), which states in part “[o]nce the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” In *State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692-93 (2005), this Court held that the statute failed because “N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) is inconsistent with N.C.R. App. P. 10(b)(1)[.]” However, at the time Defendant moved to suppress the videotapes, Rule 103 was presumed constitutional, and in our discretion we elect to review Defendant’s assignment of error. *See State v. Baublitz*, 172 N.C. App. 801, 806, 616 S.E.2d 615, 619 (2005) (reaching the defendant’s assignment of error where Rule 103 was presumed to be constitutional at the time of trial); *Tutt*, 171 N.C. App. at 524, 615 S.E.2d at 693.

[2] Nonetheless, we find Defendant’s *Crawford* argument unpersuasive. In the present case, S.V., V.V., and Y.V. each took the stand at trial and were therefore available for cross-examination. Defendant did not argue before the trial court, and does not argue before this Court, that the witnesses were “unavailable” for cross-examination. Accordingly, there was no violation of Defendant’s right to confrontation under *Crawford*.

[3] Defendant also argues that the interviews were improperly admitted pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(4). We disagree.

N.C. Gen. Stat. § 8C-1, Rule 803 (2005) states

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

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(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The test to determine whether statements are admissible under Rule 803(4) is a two-part test: “(1) whether the declarant’s statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant’s statements were reasonably pertinent to diagnosis or treatment.” *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000), *cert. denied*, *Hinnant v. North Carolina*, 544 U.S. 982, 161 L. Ed. 2d 737 (2005). Testimony meeting this test “is considered inherently reliable because of the declarant’s motivation to tell the truth in order to receive proper treatment.” *Id.* at 286, 523 S.E.2d at 669. Thus, “the proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment.” *Id.* at 287, 523 S.E.2d at 669.

In *State v. Lewis*, 172 N.C. App. 97, 103-04, 616 S.E.2d 1, 5 (2005), and *State v. Isenberg*, 148 N.C. App. 29, 38, 557 S.E.2d 568, 574 (2001), *disc. review denied*, 355 N.C. 288, 561 S.E.2d 268 (2002), this Court found that the *Hinnant* requirements were satisfied where the challenged statements were made to pediatric nurses at the Children’s Center prior to examination by the doctor. We find the present case indistinguishable from *Lewis* and *Isenberg*, and affirm the trial court’s admission of the videotaped interviews pursuant to Rule 803(4).

[4] Defendant next argues the trial court erroneously admitted, as an excited utterance under N.C. Gen. Stat. § 8C-1, Rule 803(2), the testimony of Y.V.’s mother that Defendant was in Y.V.’s room the previous night and had touched and scared Y.V. The trial court admitted the testimony as an excited utterance, finding Y.V.’s statements were made after a “sufficiently startling experience suspending reflective thought and were a spontaneous reaction to questions asked by [S.P.] at a time temporally related to her having yelled at [Y.V.] for having positioned the dolls as she had.” T.48.

N.C. Gen. Stat. § 8C-1, Rule 803(2) (2005) excepts from the hearsay rule an excited utterance, which is “[a] statement relating to

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a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” In *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985), the Supreme Court held that “[i]n order to fall within this hearsay exception, there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” In the context of statements made by children, “there is more flexibility concerning the length of time between the startling event and the making of the statements because the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than adults.” *State v. Boczkowski*, 130 N.C. App. 702, 710, 504 S.E.2d 796, 801 (1998) (internal citation and quotation omitted).

In the present case, fewer than twenty-four hours had elapsed between the time S.P. yelled at Y.V., the sexual assault, and Y.V.’s statements to her mother. Therefore, the trial court properly admitted the statements as excited utterances. *See Smith*, 315 N.C. at 90, 337 S.E.2d at 843 (statements made by small children “between two and three days” after the startling event were properly admitted pursuant to Rule 803(2)); *State v. Thomas*, 119 N.C. 708, 713, 460 S.E.2d 349, 353, *disc. review denied*, 342 N.C. 196, 463 S.E.2d 248 (1995) (“In the circumstances of this case, we do not believe the passage of four or five days detracts from the ‘spontaneity’ of [the child’s] response.”).

[5] Defendant next argues that the trial court erred by permitting Mahaney to testify that S.V. suffered from post-traumatic stress, or “trauma related to abuse.” Since Defendant did not object at trial, we analyze this under the plain error standard. N.C.R. App. P. 10(c)(4).

Defendant cites *State v. Bush*, 164 N.C. App. 254, 258, 595 S.E.2d 715, 718 (2004) for the proposition that

[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim’s credibility.

We find this language inapplicable to the present case because in the present case the State presented physical evidence supporting a diagnosis of sexual abuse with regard to each child. Further, “[i]t is well settled that an expert medical witness may render an opinion pur-

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suant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e., physical evidence consistent with sexual abuse.” *State v. Goforth*, 170 N.C. App. 584, 589, 614 S.E.2d 313, 316, *cert. denied*, 359 N.C. 854, 619 S.E.2d 854 (2005) (internal citations and quotation omitted). Further, the trial court instructed the jury that expert opinion testimony that a person suffers from post-traumatic stress syndrome may be considered only if it is found to corroborate a victim’s statements. The trial court further charged: “The testimony is admitted solely for the purpose of corroboration and not as substantive evidence. You may not convict . . . [D]efendant solely on this opinion testimony.” This assignment of error is overruled.

[6] Defendant next argues that the jury instructions and verdict sheets violated his constitutional right to a unanimous verdict pursuant to N.C. Const. art. 1, § 24 (“No person shall be convicted of any crime but by the unanimous verdict of a jury in open court.”). We disagree.

Specifically, Defendant argues the verdict sheets were deficient in that the date(s) of the acts alleged were not included, nor was the location of the acts. Therefore, Defendant argues, jurors may not have been unanimous about any particular sex act on a particular day, time, or location. Defendant relies on this Court’s decision in *State v. Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004) (*Lawrence I*), *rev’d in part and remanded*, 360 N.C. 393, 627 S.E.2d 615 (2006). However, since Defendant filed his brief with this Court, the Supreme Court reversed *Lawrence I* for the reasons stated in *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006) (*Lawrence II*). In *Lawrence II*, the Supreme Court found a defendant may be unanimously convicted pursuant to the indecent liberties statute even if “(1) the jurors considered a higher number of incidents of immoral or indecent behavior than the number of counts charged, and (2) the indictments lacked specific details to identify the specific incidents” because “while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.” *Lawrence II*, 360 N.C. at 374-75, 627 S.E.2d at 612-13. In *State v. Brigrman*, 178 N.C. App. 78, 632 S.E.2d 498, *disc review denied*, 360 N.C. 650, 636 S.E.2d 813 (2006), this Court applied the same rationale to charges of sex offense and overruled the defendant’s jury unanimity argument where “the jury was instructed on all issues, including unanimity; [and] separate verdict sheets were

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submitted to the jury for each charge.’” *Id.* at 93-94, 632 S.E.2d at 508 (quoting *Lawrence II*, 360 N.C. at 376, 627 S.E.2d at 613)). We find these cases controlling and overrule Defendant’s jury unanimity argument.

[7] Defendant next argues that it was plain error for the trial court to find Y.V., S.V., and V.V. competent to testify. Defendant made no objection to the testimony of any of the three children, and therefore, failed to preserve this error for our review. N.C.R. App. P. 10(b)(1). Accordingly, we review this argument for plain error only. N.C.R. App. P. 10(c)(4). To show plain error, Defendant must demonstrate that “the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, . . . or [that] the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings[.]” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotations omitted).

N.C. Gen. Stat. § 8C-1, Rule 601(a) (2005) provides that “[e]very person is competent to be a witness except as otherwise provided in these rules.” If the trial court determines that the witness is “incapable of expressing himself concerning the matter[,]” or “incapable of understanding the duty of a witness to tell the truth,” then the trial court may disqualify the witness. N.C.G.S. § 8C-1, Rule 601(b). This determination rests in the sound discretion of the trial court. *State v. Fearing*, 315 N.C. 167, 173, 337 S.E.2d 551, 554-55 (1985).

At trial, Y.V., S.V., and V.V., each took the stand outside the presence of the jury and were questioned by the State and the trial court. Each child demonstrated an ability to distinguish between the truth and a lie, stated that it was good to tell the truth, and bad to tell a lie, and understood that telling a lie led to some form of punishment. With each witness, the trial court made detailed findings of fact regarding the competency of each witness to testify. We conclude that it was not error to find the children competent to testify, and therefore, Defendant’s plain error argument is without merit.

[8] Defendant next argues that the guilty verdict for sexual offense for penetration of the anal opening of S.V. was plain error because it was not charged in the indictment or described in the bill of particulars. Brief 30. Defendant fails to note that the State filed superceding indictments, which conformed to the language of N.C. Gen. Stat. § 14-27.4(a)(1). Our Supreme Court has held that an indictment which conforms to the requirements of N.C. Gen. Stat.

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§ 15-144.2(b) need not specify which sexual act was committed to be sufficient to charge first-degree sexual offense. *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982). This assignment of error is overruled.

[9] Defendant next argues that the trial court erred when it denied Defendant's motion to dismiss each charge for insufficient evidence. Specifically, Defendant argues that there was insufficient evidence to support the element of penetration. "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of [the] defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991) (internal citation and quotation omitted). "The evidence must be viewed in the light most favorable to the State, and the State must receive every reasonable inference to be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal." *State v. King*, 343 N.C. 29, 36, 468 S.E.2d 232, 237 (1996) (citations omitted).

Defendant was charged with first-degree sexual offense pursuant to N.C. Gen. Stat. § 14-27.4(a)(1). To be convicted of this offense, the State must prove that (1) a defendant engaged in a sexual act, (2) the victim was under the age of thirteen years, and (3) at the time of the act the defendant was at least twelve years old and was at least four years older than the victim. N.C. Gen. Stat. § 14-27.4(a)(1) (2005). "‘Sexual act’ means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person’s body[.]". N.C. Gen. Stat. § 14-27.1(4) (2005).

The jury convicted Defendant of one count of first-degree sexual offense for penetration of the vaginal opening and one count of first-degree sexual offense for penetration of the anal opening as to Y.V. and S.V., and two counts of first-degree sexual offense of V.V. for penetration of the anal opening. Because we find all of the charges supported with sufficient evidence, we conclude that the trial court properly denied Defendant's motion to dismiss each of the charges.

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The State's evidence with regard to the charges against Y.V. included the videotaped interview with Nurse Fink in which Y.V. states that "Bird" touched Y.V. on her "private" with his fingers while her mother was at work. She also stated that someone touched her on her "hiney" although she did not specifically state it was Defendant. Further, S.P. testified that Y.V. told her that Defendant had touched her "private[,]" rubbed it, and scared her. Dr. Soucie's examination revealed vaginal bruising and anal scars. Likewise, the charges of first-degree sexual offense of V.V. were supported by V.V.'s videotaped interview with Nurse Brafford, and his in-court testimony. V.V. told Nurse Brafford that "Uncle Bird" touched his "winkie" and his "butt." V.V. also told her that "Bird" "peed on his butt." Dr. Soucie observed that V.V. had a persistent anal scar which could have resulted from repeated penetration.

The State supported its allegations of sexual offense of S.V. with her videotaped interview with Nurse Cook, and S.V.'s in-court testimony. S.V. testified that "Bird" touched her "privates" in the bathroom of her house. Further, Dr. Soucie's medical examination revealed that S.V. had scars on her perianal area. We find the statements of Y.V., S.V., and V.V., and the State's medical testimony sufficient to withstand Defendant's motion to dismiss as to each of the charges.

[10] Finally, Defendant argues that the trial court erred by failing to instruct the jury on attempted sexual offense because the evidence supported such an instruction. We disagree.

"A trial court is only required to instruct the jury on a lesser included offense when there is evidence presented from which the jury could find that such offense was committed." *State v. Stinson*, 127 N.C. App. 252, 258, 489 S.E.2d 182, 186 (1997). No evidence presented at trial would support a jury finding of attempted sexual offense. The State's evidence tended to show completed acts of penetration, which the State's medical evidence supported. Further, in his own testimony, Defendant denied any sexual contact with the children. We can see no evidence to support a finding of attempted sexual offense, and therefore, hold that the trial court did not err in refusing to instruct on attempted sexual offense.

Defendant has failed to cite authority to support his remaining assignments of error in violation of N.C.R. App. P. 28(b)(6) and we therefore decline to address them.

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No error.

Chief Judge MARTIN and Judge WYNN concur.

STATE OF NORTH CAROLINA v. DWIGHT McDUGALD

No. COA06-164

(Filed 2 January 2007)

1. Appeal and Error— incomplete record—incomplete notice of appeal—guilty pleas without preservation of evidence issue

Violations of the appellate rules resulted in dismissal of an assignment of error about the denial of a motion to suppress evidence, and Rule 2 was not invoked to hear the issue because, given the significant violations of the appellate rules, doing so would create an appeal. The record contained only a partial order, the notice of appeal did not designate the judgments and orders from which defendant appeals, and specifically did not refer to the order denying defendant's motion to suppress, and defendant pled guilty to two of the charges without preserving his issue as to those charges.

2. Appeal and Error— preservation of issues—subsequent testimony admitted without objection—plain error not alleged

There was no plain error in a prosecution for trafficking in ecstasy where a detective was allowed to testify about his two-year investigation of defendant. While the initial testimony was over defendant's objection, subsequent detailed testimony was without objection, and defendant did not specifically and distinctly allege plain error on appeal.

3. Appeal and Error— preservation of issues—admission of audiotape—copy not provided to appellate court

The issue of whether an audiotape was properly admitted was not preserved for appeal where defendant did not provide the court with a copy of the tape or of the transcript that accompanied the tape at trial. Moreover, one of the participants who

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was on the tape was subsequently allowed to testify without objection.

Judge ELMORE concurring in part and dissenting in part.

Appeal by defendant from judgments entered 12 April 2005 by Judge Jerry Cash Martin in Guilford County Superior Court. Heard in the Court of Appeals 19 October 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John P. Scherer, II, for the State.

Irving Joyner, for defendant-appellant.

JACKSON, Judge.

On 7 July 2004, Dwight McDougald (“defendant”) was arrested and subsequently indicted on charges of trafficking in methylenedioxyamphetamine (“MDA”), trafficking by possessing MDA, and conspiracy to traffick MDA. Defendant was arrested, along with Kathryn Powell (“Powell”), in conjunction with an undercover drug sale coordinated by Detective Aaron Griffiths (“Griffiths”) of the Greensboro Police Department.

Griffiths testified that prior to defendant’s arrest in 2004, he had been investigating defendant for the previous two years. In April of 2004, Griffiths arrested Earl Jones (“Jones”) for possession of marijuana and an assault rifle. Jones agreed to cooperate with Griffiths by providing information about drug dealers, drug deals, and other information, in return for assistance with Jones’ pending federal prosecution. During his cooperation with Griffiths, Jones was told to contact Powell in order to set a date when Jones could purchase drugs from Powell. Powell’s name had come up during Griffiths’ investigation. Per Griffiths’ instruction, Jones was to purchase 500 ecstasy, or MDA, pills from Powell. Powell testified that once contacted by Jones, she then contacted defendant to see if he could supply her with this amount of MDA. Powell stated that she and defendant discussed how much defendant would charge her for the pills and then how much she in turn could charge Jones in order for her to make a profit. Griffiths instructed Jones to set 7 July 2004 as the date for the sale; Jones contacted Powell and arranged for the drug sale to occur on that date.

On 7 July 2004, Griffiths arranged for Detective Duane James (“James”) to participate in the undercover drug sale, by posing as

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the individual providing the cash for the sale. Griffiths outfitted Jones with a body wire, which recorded the events of the drug sale, including the conversations between Powell, Jones, and James. Powell testified that just before the sale was to occur, defendant informed her that he only had 385 MDA pills, not the 500 to which he had initially agreed. Powell then informed Jones of the reduced amount.

Powell testified that defendant told her that on the day of the sale, that she was to contact him when Jones arrived, and that he would walk over to her place with the pills. She stated that defendant paid her prior to the actual sale, for her portion of the profit from the sale. At the time of the arranged sale, Jones arrived at the apartment complex where both Powell and defendant lived. Detective James rode separately from Jones, but arrived at the apartment complex at the same time. Jones called Powell to let her know that he was there, at which time she came downstairs and approached Jones' car. While Powell was talking with Jones, defendant was seen leaving his apartment and walking to Powell's apartment. During this time, Powell's daughter had come downstairs and began coming over to Powell. Powell then left Jones to take her daughter back up to her apartment so that defendant could watch her daughter, along with his own son. When Powell came back downstairs to Jones, he took her over to James, where he introduced James and the three of them set up the details of the sale.

Powell testified that she then went back upstairs to her apartment, where defendant gave her the MDA pills and explained to her how they were arranged in the bag. Powell then took the bag of pills downstairs, where she gave them to James in exchange for \$3,000.00. As Powell attempted to return to the apartment complex, she was arrested by Griffiths. Griffiths, along with other officers, then went to Powell's apartment, where defendant was arrested.

Once defendant was placed under arrest, Griffiths asked defendant for consent to search his apartment, to which defendant repeatedly refused to give consent. Griffiths called defendant's wife, Chasity McDougald ("McDougald"), so that she could come to the apartment to get their son for whom defendant had been caring. Upon arriving at the scene, McDougald was informed about her husband's arrest, and was told that he had refused to give consent for officers to search the apartment that they shared. Griffiths testified that he asked McDougald if she would give her consent to allow the officers to search her apartment. He stated that she agreed, and that he then read a consent to search form to her, which she then signed.

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Upon searching defendant's apartment, Griffiths and the other officers found a bag of marijuana, a bag of MDA pills, \$9,480.00, and Inositol, which can be used to cut cocaine. Officers also found an additional \$398.00 and a bag of marijuana during the search of defendant's person. Prior to trial, defendant filed a motion to suppress all of the evidence seized during the search of his apartment, arguing that due to his wife's high risk pregnancy at the time, she lacked the capacity to consent to the search. He also argued that once he had already refused consent, it was improper for Griffiths to then seek consent from his wife. Defendant's motion to suppress was denied following a hearing on the matter on 5 April 2005.

After their arrest, defendant and Powell were taken to the Guilford County Jail. Griffiths testified that when he interviewed Powell, she stated that she was delivering the pills for defendant, and that she was to make \$200.00 for doing so. Griffiths then stated that while he was completing the necessary paperwork, defendant approached him and voluntarily said that Powell "was just going to make a little money for this. She don't know what she's doing or what's going on."

Following a trial on the three charges, a jury found defendant guilty of conspiracy to traffick by possessing 100 or more but less than 500 dosage units of MDA. The jury was unable to reach a unanimous verdict as to the remaining two charges. Defendant then entered guilty pleas to trafficking by possessing 100 or more but less than 500 dosage units of MDA and to sale of Schedule I substance, MDA. Defendant was sentenced to a term of thirty-five to forty-two months imprisonment for the offenses of trafficking by possessing and conspiracy to traffick. For the offense of sale of a Schedule I substance, MDA, defendant was given a suspended sentence of thirty-six months of supervised probation, which was ordered to begin at the expiration of his prison term. From his conviction, defendant appeals.

[1] Defendant first contends the trial court erred in denying his motion to suppress. However, we decline to address this issue due to the numerous violations of our appellate rules. Defendant's assignment of error is dismissed.

Rule 9 of the North Carolina Rules of Appellate Procedure requires an appellant to include in the record on appeal "copies of the . . . order, or other determination from which appeal is taken." N.C. R. App. P. 9(a)(3)(g) (2006). The record before this Court con-

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tains the first two pages of the order denying defendant's motion, but it does not contain the portion of the order with the trial court's conclusions of law, date or signature of the trial judge. During oral argument, counsel for defendant represented to the Court that the record had been amended to include the complete order, when in fact this was not the case and no amendment had occurred. One week after this case was heard, defendant filed a motion to amend the record on appeal to include the complete order. We denied defendant's motion. As the appellant, defendant had the duty and responsibility to make sure the record on appeal filed with this Court was complete. *Hill v. Hill*, 13 N.C. App. 641, 642, 186 S.E.2d 665, 666 (1972). This Court's review of an appeal from the trial division "is solely upon the record on appeal." N.C. R. App. P. 9(a) (2006).

Defendant's Notice of Appeal also does not comply with our appellate rules, in that it fails to designate from which judgments and orders defendant appeals, and it specifically fails to reference the order denying his motion to suppress. See N.C. R. App. P. 3(d) (2006); *Finley Forest Condo. Ass'n v. Perry*, 163 N.C. App. 735, 741, 594 S.E.2d 227, 231 (2004) ("Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2." (quoting *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), aff'd, 341 N.C. 702, 462 S.E.2d 219 (1995))). Based on the significant violations of our appellate rules, were this Court to invoke Rule 2 of our appellate rules to address this issue, we would be creating an appeal for defendant, and therefore violating *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, reh'g denied, 359 N.C. 643, 617 S.E.2d 662 (2005). See *Viar*, 359 N.C. at 402, 610 S.E.2d at 361 ("It is not the role of the appellate courts, however, to create an appeal for an appellant.").

Moreover, defendant was found guilty on only one charge, and pled guilty to two additional charges. North Carolina General Statutes, section 15A-979 provides that "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2005). However, "[t]his statutory right to appeal is conditional, not absolute." *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), aff'd, 344 N.C. 623, 476 S.E.2d 106 (1996). Defendant failed to preserve his appeal on this order at the time he pled guilty to two of the three charges, thus he has waived his appeal on the denial of the motion with respect to the

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two charges to which he pled guilty. *See State v. Stevens*, 151 N.C. App. 561, 563, 566 S.E.2d 149, 150 (2002) (“[A] defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.” (citation omitted)).

As defendant’s appeal on this issue is not properly before this Court, we dismiss this assignment of error.

Defendant next contends the trial court erred in permitting one of the State’s witnesses to testify regarding details of an ongoing investigation of purported, but uncharged, criminal activities of defendant which lead up to his arrest for the present charges. Specifically, defendant contends the trial court erred in permitting Detective Griffiths to testify that he had been investigating defendant for two years prior to his arrest. Defendant also contends the trial court erred in permitting an audio recording, and accompanying transcript, to be played for and published to the jury. Defendant argues that the recording, which contains only the voices of Powell, Detective James, and Jones, the informant, does not contain defendant’s voice or any reference to defendant, and therefore was unduly prejudicial.

Rule 401 of the North Carolina Rules of Evidence defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (2005). In criminal cases, “every circumstance calculated to throw any light upon the supposed crime is admissible and permissible.” *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). All determinations on the weight of such evidence are matters which are properly left to the jury. *State v. Smith*, 357 N.C. 604, 614, 588 S.E.2d 453, 460 (2003), *cert. denied*, 542 U.S. 941, 159 L. Ed. 2d 819 (2004). While a trial court’s rulings on the relevancy of evidence are not discretionary, they are given great deference on appeal. *State v. Streckfuss*, 171 N.C. App. 81, 88, 614 S.E.2d 323, 328 (2005).

Evidence which is found to be relevant may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” N.C. Gen. Stat. § 8C-1, Rule 403 (2005). “A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court’s determination will only be disturbed upon

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a showing of an abuse of that discretion." *State v. Grant*, 178 N.C. App. 565, 573, 632 S.E.2d 258, 265 (2006) (citing *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, 547 U.S. 1073, 164 L. Ed. 2d 523 (2006)).

[2] On appeal, defendant argues the trial court erred in allowing Detective Griffiths to present irrelevant testimony concerning his ongoing two-year investigation of defendant prior to defendant's arrest in April 2004, and of the detective's interactions with the informant and preparations for the undercover drug sale. Defendant contends not only was this testimony irrelevant, but also that its probative value was substantially outweighed by its prejudicial effect, and therefore it should have been excluded pursuant to Rule 403 of our Rules of Evidence.

Detective Griffiths testified, over defendant's objection, that he first became involved in the investigation that resulted in defendant's arrest in 2002. He then testified, without objection, that the investigation continued until the date of defendant's arrest in 2004, and that prior to the arrest of defendant, he had been doing surveillance at defendant's apartment complex. Detective Griffiths then went on to testify in detail, and without objection, concerning the criminal history of Jones, his preparation with Jones, and the details of setting up the undercover drug sale with Powell, the informant, and the other officers involved. Also, while cross-examining Detective Griffiths, defendant elicited additional testimony concerning the detective's two-year investigation of defendant and his surveillance activities of defendant.

Generally, a defendant must make a timely objection to proffered testimony in order to preserve the issue for appellate review, and when a defendant has failed to object this Court may only review the matter for plain error. N.C. R. App. P. 10(b)(1) and (c)(4) (2006); *State v. Barden*, 356 N.C. 316, 348, 572 S.E.2d 108, 130 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Also, "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Thus, as defendant has failed to preserve his appeal on the above testimony by either failing to object initially, or by failing to object when the same testimony was elicited later, this assignment of error may be reviewed only for plain error. However, because defendant did not "specifically and distinctly" allege plain error as required

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by Rule 10(c)(4) of our appellate rules, defendant is not entitled to plain error review of this issue. N.C. R. App. P. 10(c)(4) (2006).

[3] At trial, the State was permitted, over defendant's objection, to play for the jury an audiotape of the conversation between Powell and Jones, which was recorded by a body wire being worn by Jones. The audiotape also included brief statements by Detective James, the undercover officer, but did not include any statements made by defendant. While the audiotape was played for the jury, the jury was permitted to follow along with the audiotape by reading a transcript of the recording. The State contended that the audiotape and accompanying transcript corroborate the previous testimony given by Detectives James and Griffiths concerning the undercover drug sale.

Rule 9(d)(2) of the North Carolina Rules of Appellate Procedure requires that exhibits "offered in evidence and required for understanding of errors assigned shall be filed with the appellate court." N.C. R. App. P. 9(d)(2) (2006). As defendant has failed to provide this Court with either a copy of the audiotape or the accompanying transcript, we are unable to review the challenged exhibits to determine whether they were prejudicial in light of the testimony by Detectives James and Griffiths describing what occurred during the undercover drug sale. "[D]efendant has failed to bring forward a record sufficient to allow proper review of this issue and has failed to overcome the presumption of correctness at trial." *State v. Ali*, 329 N.C. 394, 412, 407 S.E.2d 183, 194 (1991). We also note, that subsequent to the playing of the audiotape, Powell was permitted, without objection, to testify not only about her repeated conversations with defendant in preparation for the undercover drug sale, but also about the events of the sale itself. Therefore, we hold this assignment of error is without merit.

No error.

Chief Judge MARTIN concurs.

Judge ELMORE concurs in part; dissents in part in a separate opinion.

ELMORE, Judge, concurring in part and dissenting in part.

I concur in the majority opinion that there was no error in defendant's convictions of the crimes to which he entered guilty pleas (traf-

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ficking by possessing 100 or more but less than 500 dosage units of MDA and for sale of Schedule I substance, MDA). However, I respectfully dissent from that part of the majority opinion upholding defendant's jury conviction of conspiracy to traffic by possessing 100 or more but less than 500 dosage units of MDA. I would address on the merits defendant's contention that the trial court erred in denying defendant's motion to suppress, rather than dismissing it based on rules violations. Accordingly, because I believe that the trial court erred in its denial of defendant's motion, I would vacate defendant's conviction of conspiracy to traffic by possessing 100 or more but less than 500 dosage units of MDA.

Preliminarily, I would note that while the complete order is not in the record, the trial court's findings and conclusions appear in the transcript at pages 18-21. It is true that the notice of appeal does not reference the order denying the motion to suppress. However, this issue was argued vigorously before this Court at oral arguments, and the panel responded with questions directed to this issue. I agree with a recent dissent by Judge Geer, who wrote that "the proper line is to dismiss only those appeals that substantively affect the ability of the appellee to respond and this Court to address the appeal." *Stann v. Levine*, 180 N.C. App. 1, 16, 636 S.E.2d 214, 223 (2006) (Geer, J., dissenting). Given that, in my view, the State practically conceded the unconstitutionality of the search at oral arguments, I would invoke Rule 2 of our Rules of Appellate Procedure to avoid manifest injustice and address this issue on its merits. N.C.R. App. P. Rule 2 (2006) ("To prevent manifest injustice to a party . . . [an appellate court] may . . . suspend or vary the requirements or provisions of any of [the] rules[.]").

Defendant essentially argues that a recent United States Supreme Court decision establishes that his Fourth Amendment rights were violated. *Georgia v. Randolph*, 547 U.S. 103, 164 L. Ed. 2d 208 (2006). In *Randolph*, the majority held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120, 164 L. Ed. 2d at 226.

Indeed, the State concedes that *Randolph* applies. It argues, however, that the error was harmless. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen.

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Stat. § 15A-1443(b) (2005). “[T]he question is ‘whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.’” *State v. Soyars*, 332 N.C. 47, 58, 418 S.E.2d 480, 487 (1992) (quoting *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (1967)) (internal quotations omitted).

It is true that “[o]verwhelming evidence of guilt may render constitutional error harmless.” *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 276 (1995) (citation omitted). The State contends that it provided such “overwhelming evidence” in this case. However, aside from the MDA and ecstasy found in defendant’s apartment, the only evidence that tended to show his guilt was the testimony of police officers and Powell. The officers in question were not witnesses to the interaction between Powell and defendant on the date in question, nor were they privy to the phone conversations regarding the set-up of the drug deal. Powell testified against defendant at trial as part of her own plea deal. This evidence simply does not rise to the level of “overwhelming evidence.” The discovery of MDA and ecstasy in the apartment was clearly a major part of the case against defendant that “contributed to [his] conviction.” *Soyars*, at 58, 418 S.E.2d at 487. I would therefore hold that the error was not harmless beyond a reasonable doubt.

I would address on the merits defendant’s contention that the trial court erred in denying defendant’s motion to suppress. Having done so, I would hold that defendant’s Fourth Amendment rights were violated, and that the trial court erred in its denial of defendant’s motion. Accordingly, I would vacate defendant’s conviction of conspiracy to traffic by possessing 100 or more but less than 500 dosage units of MDA, and grant him a new trial on that charge.

GENE OUTERBRIDGE, EMPLOYEE, PLAINTIFF v. PERDUE FARMS, INC., EMPLOYER,
SELF-INSURED (CRAWFORD & COMPANY, SERVICING AGENT), DEFENDANT

No. COA06-33

(Filed 2 January 2007)

1. Workers’ Compensation— findings—wage earning capacity not addressed—error

The Industrial Commission’s findings were not sufficient to support its conclusion that a workers’ compensation plaintiff was limited to his impairment rating benefits (and not continued dis-

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ability) after he was determined capable of sedentary work. The Commission did not address plaintiff's wage earning capacity.

2. Appeal and Error— cross-assignments of error—not for affirmative relief

Defendant's argument was not the proper subject of a cross-assignment of error, and was not preserved for appellate review, where defendant argued that an award of temporary disability should be reversed because it was not supported by competent evidence. Defendant was thus seeking affirmative relief rather than arguing an alternative basis for supporting the judgment.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by Plaintiff from Opinion and Award entered 9 September 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 August 2006.

Curtis C. Coleman, III, for Plaintiff-Appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Brian M. Freedman, for Defendant-Appellee.

STEPHENS, Judge.

Gene Outerbridge ("Plaintiff") appeals from an Opinion and Award of the North Carolina Industrial Commission ("Commission") that awarded him benefits for temporary total disability from 15 May 2000 through 29 November 2000 and permanent partial impairment for a five percent rating to his back. For the reasons stated herein, we remand this case to the Commission for additional findings.

Plaintiff was employed by Perdue Farms ("Defendant") on 15 May 2000 when he slipped and fell at work, injuring his back. Initially, Defendant accepted Plaintiff's claim for workers' compensation benefits as compensable and continued Plaintiff's salary from 15 May 2000 to 29 November 2000. Following Defendant's refusal to pay additional benefits, a hearing was conducted before a deputy commissioner, who issued an Opinion and Award awarding Plaintiff compensation for a five percent permanent impairment rating to his back and denying Plaintiff's claim for other benefits. Plaintiff appealed to the Full Commission, which issued an Opinion and Award on 9 September 2005, awarding Plaintiff temporary total disability benefits for the same period of time that his salary was continued and com-

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pensation for a five percent permanent partial impairment of his back. Plaintiff appeals.

[1] By his first assignment of error, Plaintiff argues that the Commission erred by failing to make findings of fact as to whether he sustained a loss of wage-earning capacity after finding that he had suffered a permanent injury. We agree.

Specifically, Plaintiff's appeal challenges the Full Commission's failure to determine all the material facts arising from the evidence on the extent of Plaintiff's *disability*. Plaintiff described the disability issues in detail in the Industrial Commission Form 44 Application for Review filed with the Full Commission in connection with his appeal from the decision of the deputy commissioner. Plaintiff included multiple references to the evidence which he believed supported his contention that he was disabled and detailed his contentions regarding the lack of evidence to support a contrary determination. The uncontradicted evidence on which Plaintiff relied to support his contentions established the following:

At the time of the hearing, Plaintiff was forty-seven years old with a date of birth of 30 October 1955. He finished the tenth grade of high school. For the first fourteen years of his sixteen total years of employment with Defendant, his job was to work on machinery, "taking out motors, putting motors in, and rebuilding machines[.]" At the time of his injury, he had worked for two years as a "hands-on foreman[.]" a job which included regularly lifting fifteen to twenty pounds and, "sometimes[.]" fifty pounds. This job was performed mostly standing and also required stair-climbing. Plaintiff last performed this job on the day of his back injury, 15 May 2000. In Plaintiff's opinion, he is no longer able to do this job because of the lifting, standing and "going up and down steps" it requires. According to Plaintiff, the job is not sedentary in nature.

Plaintiff has not worked since he was released from the care of Dr. Ira Hardy, his treating neurosurgeon, on 29 November 2000. Upon releasing him, Dr. Hardy restricted Plaintiff to permanent sedentary work as defined by the Dictionary of Occupational Titles:

[e]xerting up to 10 pounds of force occasionally (. . .up to 1/3 of the time) and/or a negligible amount of force frequently (. . .1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time[.]

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The report of the Functional Capacity Evaluation administered to Plaintiff at Dr. Hardy's request on 22 September 2000 characterized Plaintiff's foreman job with Defendant as "medium" in its physical requirements. To Plaintiff's knowledge, the only jobs with Defendant that would be within the sedentary work restrictions imposed by Dr. Hardy are the jobs in the front office of the plant, such as "[s]ecretarial work, answering the phone or taking a message or something like that." Plaintiff testified that Defendant has not offered him a job since Dr. Hardy released him.

The three jobs which Defendant did offer Plaintiff were offered "immediately after" Plaintiff's injury, before he came under the care of Dr. Hardy. In the opinion of Dr. Britt and Dr. Alexander, who were treating Plaintiff at the time, those jobs were within the modified duty work restrictions they had imposed. Specifically, Dr. Alexander testified that all three jobs would permit Plaintiff to "walk, sit, or stand as desired for comfort." When asked if the jobs had been offered to Plaintiff again after he was released by Dr. Hardy, Plaintiff's supervisor replied, "Not that I'm aware of."

The only effort Plaintiff has made to find work elsewhere since he was released by Dr. Hardy was to go to two grocery stores looking for work as a bag boy. He did not fill out applications for any job at either store. Plaintiff testified that he has "asked people" for employment, but that prospective employers have "refuse[d]" to give him an application when he tells them about the medications he takes for his pain.

From the evidence before it and in the face of the disability issues raised by Plaintiff, the Full Commission determined, *inter alia*, the following:

At the time of his injury on 15 May 2000, Plaintiff had been working for Defendant for about two years performing "various manual tasks for operating the equipment" which required lifting fifteen to twenty pounds and, occasionally, fifty pounds.

The Full Commission also determined that Dr. Keith Britt, the on-site physician to whom Defendant referred Plaintiff for treatment of his injury, released him to perform "modified duty with restrictions of no bending, twisting, or lifting over 5 pounds[.]" These restrictions were in place until 25 May 2000, when Dr. Britt revised the restrictions to further limit Plaintiff's work capacity to *no* lifting, as well as no bending and twisting.

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Dr. Britt referred Plaintiff to Dr. James Alexander. Plaintiff saw this doctor on 31 May 2000, at which time he took Plaintiff out of work. On 6 June 2000, Dr. Alexander released Plaintiff to perform modified duty work “with instructions that he be permitted to walk, sit, or stand as desired for comfort.” Dr. Alexander continued these restrictions when he last saw Plaintiff on 24 July 2000. Dr. Alexander further recommended that Plaintiff see Dr. Hardy. At no time did Dr. Alexander determine that Plaintiff was totally disabled from working.

On 31 July 2000, Plaintiff came under the care of Dr. Hardy who took him out of work “so that he could properly evaluate the plaintiff’s condition.” Following the performance of various diagnostic studies, Dr. Hardy determined, on 29 November 2000, that Plaintiff had reached maximum medical improvement. He released Plaintiff from care “and restricted him to sedentary work.” He also assigned a five percent permanent impairment rating to Plaintiff’s back.

Despite specifically finding that from 15 May through 25 May 2000, Plaintiff “refused to perform the work [Defendant] offered him” within the modified duty restrictions that had been imposed by Dr. Britt, and that as of 24 July 2000, Plaintiff “continued his refusal to return to suitable work which was offered to him by the employer” in accordance with the modified duty restrictions placed by Dr. Alexander, the Commission ultimately found that Plaintiff was totally unable to work from the date of his injury on 15 May until Dr. Hardy released him from care on 29 November 2000.

The Commission also found that after 29 November 2000, Plaintiff was “capable of sedentary work, as recommended by his treating physicians.” The Commission then concluded that Plaintiff was entitled to temporary total disability benefits from 15 May through 29 November 2000 under N.C. Gen. Stat. § 97-29, and was limited to benefits thereafter under N.C. Gen. Stat. § 97-31 based on the five percent impairment rating.

Plaintiff argues that the Commission’s findings of fact, as described above, are insufficient to resolve the disability issues raised by the uncontradicted evidence. We agree that the Commission failed to make sufficient factual determinations of the *extent* of Plaintiff’s *disability* after 29 November 2000.

North Carolina workers’ compensation disability law is so well established that it hardly bears repeating. The Workers’ Compen-

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sation Act defines “disability” as the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment.” N.C. Gen. Stat. § 97-2(9). At least since the decisions of our Supreme Court in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986), and *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987), it has been the law of North Carolina that an employee who is able to prove a loss of wage-earning capacity, whether total or partial, “may elect to seek benefits under whichever statutory section will provide the more favorable remedy.” *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11, 562 S.E.2d 434, 442 (2002), *aff’d*, 357 N.C. 44, 577 S.E.2d 620 (2003). This is true even when the employee has reached maximum medical improvement and been assigned a permanent partial impairment rating. *Id.* at 14, 562 S.E.2d at 443 (“[T]he concept of MMI does not have any direct bearing upon an employee’s right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30”); *see also Hooker v. Stokes-Reynolds Hosp.*, 161 N.C. App. 111, 115, 587 S.E.2d 440, 444 (2003), *disc. review denied*, 358 N.C. 234, 594 S.E.2d 192 (2004). Plaintiff bears the burden of proving the extent of his disability and, in the absence of an Industrial Commission award of disability benefits or a Form 21 or 26 agreement approved by the Commission, does not enjoy the benefit of a presumption of disability. *See, e.g., Ramsey v. Southern Indus. Constructors, Inc.*, 178 N.C. App. 25, 630 S.E.2d 681 (2006) (citing *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 577 S.E.2d 345 (2003)). To prove entitlement to disability benefits, Plaintiff must establish either that he is unable because of his injury to earn the same wages in the same employment, or that he is unable because of his injury to earn the same wages in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). It is well settled that an injured worker can meet this burden in one of four ways:

- (1) the production of medical evidence that, as a consequence of the work-related injury, he is physically or mentally incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence that he is capable of some work, but that it would be futile to seek employment because of

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preexisting conditions, *i.e.*, age, inexperience, and/or lack of education; or

(4) the production of evidence that he has obtained other employment at a wage less than that earned prior to his injury.

Russell v. Lowes Prod. Distribution, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993); *see also Hooker v. Stokes-Reynolds Hosp.*, *supra*.

It is equally well settled that where the Commission's findings of fact are insufficient to determine the rights of the parties, the decision may be remanded to the Commission for additional findings of fact. *See, e.g., Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982). "Although the Industrial Commission is free to accept or reject any or all of plaintiff's evidence in making its award, it must make specific findings as to the facts upon which a compensation claim is based, including the extent of a claimant's disability." *Id.* at 723, 294 S.E.2d at 745; *see also Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 707, 599 S.E.2d 508, 512-13 (2004) ("Because the burden remained on plaintiff to prove his disability, the Commission was obligated to make specific findings regarding the existence and extent of any disability suffered by plaintiff").

In this case, aside from recitation of the medical evidence, the sole findings of fact the Commission made on the disability issues raised by Plaintiff were (1) Plaintiff "has not held or sought any employment" since his 15 May 2000 injury, and (2) as of 29 November 2000, Plaintiff "has been capable of sedentary work[.]". On these findings, the Commission concluded that Plaintiff was entitled to temporary total disability benefits from 15 May through 29 November 2000 and, thereafter, he was entitled to benefits only for the five percent permanent impairment rating.

By this decision, the Commission determined the *existence* of Plaintiff's disability: that his work capacity since 29 November 2000 is *sedentary*. But, it did not determine the *extent* of Plaintiff's disability because it failed to address whether, being capable of sedentary work only, Plaintiff is capable or incapable of earning the same wages he was earning at the time of his injury either in his same employment, or in other employment. Simply put, having determined that Plaintiff's work capacity is now sedentary, the Commission must address and resolve the effect of that work capacity on Plaintiff's wage-earning capacity, in the same employment or in other employment, with Plaintiff having the burden under *Hilliard* and *Russell* of

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proving loss of wage-earning capacity. Since the Commission failed to make these factual determinations, its findings of fact are insufficient to support its conclusion that after 29 November 2000, Plaintiff is limited to benefits for his impairment rating. While we do not believe the evidence compels a determination that Plaintiff proved entitlement to disability benefits in lieu of benefits for the impairment rating, “the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties . . . if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.” *Thomason v. Red Bird Cab Co.*, 235 N.C. 602, 606, 70 S.E.2d 706, 709 (1952). We thus remand this case to the Commission for additional findings as to each material fact regarding the extent of Plaintiff’s disability.

[2] We next address Defendant’s cross-assignment of error to the Commission’s conclusion that Plaintiff was entitled to temporary total disability benefits for the period of 15 May 2000 through 29 November 2000. We conclude that this issue was not properly preserved for appellate review.

Rule 10 of the North Carolina Rules of Appellate Procedure provides, in pertinent part, that “an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.” N.C.R. App. P. 10(d). Our Supreme Court “has recognized that allowing cross-assignments of error ‘provides protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based.’” *State v. Wise*, 326 N.C. 421, 428, 390 S.E.2d 142, 146-47, cert. denied, 498 U.S. 853, 112 L. Ed. 2d 113 (1990) (quoting *Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982)). However, if the issue raised “is not an alternative basis in law to support the [Commission’s Opinion and Award,] this argument is not the proper subject of a cross-assignment of error.” *Pope v. Cumberland County Hosp. Sys., Inc.*, 171 N.C. App. 748, 753, 615 S.E.2d 715, 719 (2005).

In the case *sub judice*, Defendant argues that the award of temporary total disability benefits for 15 May 2000 to 29 November 2000

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should be reversed because it is not supported by competent evidence and is contrary to law. Thus, Defendant is seeking affirmative relief in this Court rather than arguing an alternative basis in law for supporting the judgment, and is therefore not entitled to cross-assign error in its appellee's brief. *See Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 739, 407 S.E.2d 819, 826 (1991). Defendant should have filed an appellant's brief to properly raise these issues. *See id.*

In conclusion, we dismiss Defendant's cross-assignment of error and remand this case to the Commission for entry of an Opinion and Award consistent with this opinion.

Remanded.

Judge STEELMAN concurs.

Judge LEVINSON concurs in part and dissents in part.

The judges submitted this opinion for filing prior to 31 December 2006.

LEVINSON, Judge concurring in part and dissenting in part.

I concur in the majority's conclusion that defendant seeks affirmative relief in this Court rather than arguing an alternative basis in law for supporting the judgment, and that defendant is not entitled to cross-assign the error identified. I otherwise dissent from the majority opinion because it addresses issues not preserved for appeal. I write separately to address the error articulated by plaintiff.

Under N.C.R. App. P. 28(a), “[t]he function of all briefs . . . is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error [not set out in the appellant's brief] are deemed abandoned.” Rule 28 also requires that “[e]ach question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.” Rule 28(6).

In the instant case, plaintiff's appellate argument references only assignment of error number one. Accordingly, assignment of error

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number two is deemed abandoned. Assignment of error number one states that:

The Full Commission made no findings of fact regarding whether or not the Plaintiff's permanent injury affected his wage earning capacity and consequently erred by concluding that Plaintiff was only entitled to compensation for a 5% disability to his back.

The word "only" within the phrase "only entitled to compensation for a 5% disability to his back" refers to the Commission's determination that plaintiff had a five percent, rather than seven percent, impairment to his back. The word cannot refer generally to the Commission's award because, inasmuch as the Commission awarded plaintiff temporary total disability for the period between 15 May 2000 and 30 November 2000, it clearly did not "only" award benefits under N.C. Gen. Stat. § 97-31 (2005). Accordingly, this assignment of error challenges the Commission's award of compensation for a five percent permanent impairment to his back, pursuant to G.S. § 97-31.

Moreover, plaintiff did not assign error to the Commission's determination that his period of temporary disability ended on 30 November 2000. Nor did plaintiff assign error to the Commission's failure to make sufficient findings of fact to support its conclusion that he was not entitled to temporary total disability after that date. I conclude that the issue preserved by the cited assignment of error is whether the Commission erred by failing to make findings of fact about plaintiff's disability to support its determination that plaintiff had a five percent, rather than a seven percent, impairment to his back. Regardless of whether other errors might have been assigned, this Court's review is limited to those errors that are properly preserved:

The majority opinion then addressed [an] issue, not raised or argued by plaintiff, . . . [and] asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. It is not the role of the appellate courts, however, to create an appeal for an appellant. As this case illustrates, the Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule.

Viar v. N.C. Dep't of Transp., 359 N.C. 400, 402, 610 S.E.2d 360, 361 (citing *Viar v. N.C. Dep't of Transp.*, 162 N.C. App. 362, 375, 590

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S.E.2d 909, 919 (2004), and *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005).

Plaintiff argues that the Commission's finding, that plaintiff suffered a permanent impairment to his back, triggered a duty to make findings on the extent of disability or decreased wage earning potential caused by the permanent impairment. Plaintiff contends that, because it failed to make such findings, the Commission erred by awarding benefits for only five percent "disability" to his back. I disagree, and conclude that plaintiff has misstated the law in this regard.

Plaintiff essentially argues that awards under G.S. § 97-31 must be supported by findings on disability caused by the impairment. However, N.C. Gen. Stat. § "97-31 is a schedule of injuries that allows for compensation even if a claimant does not demonstrate loss of wage-earning capacity. 'Losses included in the schedule are conclusively presumed to diminish wage-earning ability.' Thus, the Industrial Commission may enter an award pursuant to section 97-31 without finding that the employee is disabled." *Childress v. Fluor Daniel, Inc.*, 162 N.C. App. 524, 528, 590 S.E.2d 893, 897 (2004) (quoting *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52-53 (1985)) (citations omitted). I conclude that the Commission was not required, as a condition of awarding benefits under G.S. § 97-31, to make findings on disability caused by the five percent permanent impairment to his back.

Plaintiff also argues more generally that the Commission erred by failing to make certain findings of fact relevant to his claim for permanent disability. However, as discussed above, plaintiff failed to assign error to the Commission's denial of his claim for permanent disability benefits, or to the Commission's determination that his period of temporary disability ended on 30 November 2000. "Our scope of review is 'confined to a consideration of those assignments of error set out in the record on appeal.' N.C.R. App. P. 10(a). Since plaintiff failed to assign this as error in the record, this issue is not properly before us." *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 346, 623 S.E.2d 334, 340 (2006).

I conclude that the Commission's Order and Award should be affirmed.

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MICKEY PLOTT, EMPLOYEE, PLAINTIFF v. BOJANGLE'S RESTAURANTS, INC., EMPLOYER, AND INSURANCE CO. OF THE STATE OF PENNSYLVANIA c/o AIG CLAIM SERVICES, CARRIER, DEFENDANTS

No. COA05-1690

(Filed 2 January 2007)

1. Workers' Compensation— failure to seek suitable employment—benefits discontinued erroneously

The Industrial Commission erroneously applied N.C.G.S. § 97-32 to discontinue workers' compensation benefits after plaintiff was released to work but failed to make reasonable efforts to find suitable employment. Defendant had not accepted compensability for plaintiff's claims and plaintiff was not receiving benefits. It is illegal to apply N.C.G.S. § 97-32 to a claim that has been denied and is in litigation.

2. Workers' Compensation— disability—findings—insufficiency

Industrial Commission findings in a workers' compensation case were not sufficient for the Court of Appeals to determine the rights of the parties, and the case was remanded, where plaintiff contended that he had proven his disability, the Commission found that plaintiff had been released to work but had not sought employment, and the Commission made no detailed findings as to plaintiffs injuries or limitations or about any of the factors in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762.

Judge TYSON dissenting.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 8 July 2005. Heard in the Court of Appeals 22 August 2006.

Raymond M. Marshall, for plaintiff-appellant.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendant-appellees.

HUDSON, Judge.

Plaintiff filed a workers' compensation claim alleging he sustained an injury by accident on 1 November 2002. Defendants denied the claim by Form 61 and plaintiff requested a hearing, which was held 18 November 2003. In June 2004, Deputy Commissioner

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Adrian A. Phillips entered an opinion and award finding that plaintiff sustained a compensable injury by accident and awarding compensation benefits beginning with the date of plaintiff's injury and "continuing until Plaintiff returns to work or further order by the Commission." Defendants appealed to the Full Commission, which modified the opinion and award, concluding that although plaintiff sustained a compensable injury by accident, defendants had offered plaintiff suitable employment and that plaintiff was entitled to benefits only from the time of the injury until plaintiff was released to work in February 2003, because plaintiff failed to make reasonable efforts to find suitable employment since being released. Plaintiff appeals. We reverse and remand.

The evidence of record tends to show the following facts. On 1 November 2002, while working as a unit manager at Bojangle's Restaurant, plaintiff tripped over a hose in the front of the store, slipped and began to fall but was able to catch himself. Plaintiff felt pain in his back and reported the incident immediately to an on-site area director for defendant-employer. Plaintiff completed his shift and returned to work the following day. On 3 November 2002, plaintiff sought medical treatment from Primecare, who released plaintiff to work in a sedentary capacity beginning on 4 November 2002. Defendants contend that they offered to accommodate plaintiff's restrictions for about a month after his injury, and it is undisputed that plaintiff did not return to work.

On 12 November, plaintiff saw his primary care physician, Dr. Lon Morgan, who wrote plaintiff out of work from 12 November to 18 November. Plaintiff followed up with Dr. Morgan on 19 November 2002, at which time Dr. Morgan recommended plaintiff stay out of work another week. On 2 December 2002, plaintiff saw Dr. Christopher Bashore, an orthopedic surgeon, who released plaintiff to return to light duty work with restrictions. On 10 December 2002, Dr. William Brown, a neurosurgeon, examined plaintiff, prescribed epidural steroid injections, and wrote plaintiff out of work until that course of treatment was completed. Dr. Brown released plaintiff to work with significant permanent restrictions on 24 February 2003. At the hearing, plaintiff testified, and defendant-employer's human resources manager confirmed, that defendant could not accommodate the restrictions suggested by Dr. Brown during this period. On 13 June 2003, Dr. Brown wrote plaintiff out of work from 3 December 2002 to 3 August 2003, and on 6 August 2003, Dr. Brown wrote plaintiff out of work "indefinitely."

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At the hearing, plaintiff testified that he had not worked or sought work since November 2002 because of his pain and limitations. Plaintiff also testified that defendants had not offered vocational services. During his deposition, Dr. Brown testified that he believes that plaintiff could do some sort of work “if enough restrictions are applied,” and recommended that plaintiff “[f]ind a different type of job.” Plaintiff has a high school diploma and has taken a couple of courses in machine shop. Prior to beginning his employment with defendant in 1999, plaintiff had worked as a forklift operator, as a machine operator, at K-Mart in deli/food service, had managed a McDonald’s restaurant, and had worked at a pizza restaurant.

[1] In his brief, plaintiff argues that there was insufficient evidence to support the Commission’s findings and conclusion that defendant offered him a light duty position that would accommodate his restrictions. Defendant argues that plaintiff was not entitled to benefits because of N.C. Gen. Stat. § 97-32 (2004), which states that “[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.” *Id.* Here, the Commission concluded that

4. Plaintiff was offered sedentary employment at his preinjury wage by defendant but refused to attempt this employment and has not made reasonable efforts to find suitable employment since being released to return to work on 24 February 2003. Plaintiff is therefore not entitled to ongoing weekly disability benefits. N.C.G.S. 97-32.

N.C. Gen. Stat. § 97-32 is entitled “Refusal of injured employee to accept suitable employment as *suspending* compensation,” and applies where an employer seeks to “*discontinue* disability payments.” *Williams v. Pee Dee Electrical Membership Corp.*, 130 N.C. App. 298, 301, 502 S.E.2d 645, 647 (1998) (emphasis added). See also *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 361, 489 S.E.2d 445, 447 (1997). However, it is undisputed that defendant had not accepted compensability for plaintiff’s claim and that plaintiff had not been receiving any workers’ compensation benefits. Since a suspension of compensation under section 97-32 is by definition temporary and a plaintiff can restore benefits by discontinuing the refusal, it is illogical to apply section 97-32 to a claim that has been denied and is in litigation. Here, even if plaintiff had accepted defendant’s job, he was receiving no benefits which could have then resumed. We thus

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conclude that the Commission erroneously applied N.C. Gen. Stat. § 97-32 here.

[2] Plaintiff also argues that he proved his disability, but that the Commission failed to make findings as to his disability or its extent. “In order to obtain compensation under the Workers’ Compensation Act, the claimant has the burden of proving the existence of his disability and its extent.” *Hendrix v. Linn-Corrhier Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). A plaintiff can meet this burden in four ways:

- (1) medical evidence that, as a consequence of the work-related injury, the employee is incapable of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful, after reasonable efforts, in obtaining employment; (3) evidence that the employee is capable of some work, but that it would be futile to seek employment because of preexisting conditions, such as age or lack of education; or (4) evidence that the employee has obtained employment at a wage less than that earned prior to the injury.

Silva v. Lowe's Home Improvement, 176 N.C. App. 229, 237, 625 S.E.2d 613, 620 (2006) (citing *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). If the claimant meets this initial burden, the burden shifts to the defendant to show that “suitable jobs are available, [and] also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.” *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

“The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding.” *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). “However, the Commission’s legal conclusions are reviewable by the appellate courts.” *Id.* “While the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends.” *Gaines v. L. D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 866, 859 (1977). “Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact.” *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987).

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Here, the Commission made no findings regarding the nature of plaintiff's disability or its extent. The Commission found that doctors released plaintiff to work and that defendant-employer offered plaintiff "a position within his restrictions," but that "Plaintiff refused to attempt this position and subsequently failed to seek employment." However, the Commission made no detailed findings as to plaintiff's physical injuries and limitations or as to any of the *Russell* factors. Because the Commission's findings here are insufficient to enable us "to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton* at 592, 355 S.E.2d at 160.

Reversed and remanded.

Judge WYNN concurs.

Judge TYSON dissents in a separate opinion.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

TYSON, Judge, dissenting.

The majority's opinion "reverse[s] and remand[s]" this case to the North Carolina Industrial Commission (the "Commission") for further findings of fact. Where additional findings are required, the proper mandate from this Court is to simply remand for further findings. "Where the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987). Under this Court's standard of review, we do not reweigh credibility determinations of the evidence before the Commission. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). I vote to affirm the Commission's opinion and award and respectfully dissent.

I. Standard of Review

"The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (citations omitted).

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The Commission is not required to make specific findings of fact on every issue raised by the evidence, only findings of crucial facts upon which the right to compensation depends are required. *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977). “The Commission is not required to make a finding as to each detail of the evidence or as to every inference or shade of meaning to be drawn therefrom.” *Guest v. Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955).

II. Background

On 2 December 2002, Dr. Christopher Bayshore, an orthopedic specialist, released plaintiff to return to light duty work with restrictions. On 10 December 2002, Dr. William Brown (“Dr. Brown”), a neurosurgeon, treated plaintiff, prescribed epidural steroid injections, and released plaintiff from work until treatment was completed. Dr. Brown released plaintiff to work with restrictions on 24 February 2003. Dr. Brown testified that he believed that he could work “if enough restrictions [were] applied,” and recommended plaintiff “[f]ind a different type of job.”

Plaintiff admitted he had neither attempted to return to work nor sought any employment since November 2002 and blamed his lack of efforts on pain and limitations. Plaintiff achieved a high school diploma and has taken courses in machine shop. Plaintiff has experience as a forklift and machine operator. Prior to employment with Bojangle’s in 1999, plaintiff gained experience in food service and restaurant management. Plaintiff worked for K-Mart in deli/food service, at a pizza restaurant, and managed a McDonald’s Restaurant.

In 1999, plaintiff obtained employment with defendant Bojangle’s Restaurants, Inc. as an Assistant Unit Manager. His job duties included cooking, cleaning, overseeing employees, and maintaining positive customer service relations. Plaintiff testified that at the time he accepted the position with Bojangle’s he had incurred a partial disability from a prior work related injury. Plaintiff testified he felt comfortable accepting employment with Bojangle’s with restrictions and was able to perform his job for three and one-half years under such restrictions.

The Commission made determinations on plaintiff’s credibility and entered findings of fact that he “had not been forthcoming regarding defendant-employer’s willingness to accommodate plaintiff’s restrictions.” The Commission also entered findings that “plain-

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tiff misinformed Dr. Morgan, mischaracterizing the incident of 1 November 2002.” The Commission weighed the credibility of the evidence and entered findings of fact that Bojangle’s offered plaintiff a position within his restrictions, which he refused to accept or attempt, and that subsequently failed to seek any employment.

III. Disability

“ ‘In order to obtain compensation under the Workers’ Compensation Act, the claimant has the burden of proving the existence of his disability and its extent.’ ” *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). “[T]he burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment.” *Shaw v. United Parcel Service*, 116 N.C. App. 598, 601, 449 S.E.2d 50, 52 (1994), aff’d per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995). A plaintiff may meet this burden in four ways:

- (1) medical evidence that, as a consequence of the work-related injury, the employee is incapable of work in any employment; (2) evidence that the employee is capable of some work, but has been unsuccessful, after reasonable efforts, in obtaining employment; (3) evidence that the employee is capable of some work, but that it would be futile to seek employment because of preexisting conditions, such as age or lack of education; or (4) evidence that the employee has obtained employment at a wage less than that earned prior to the injury.

Silva v. Lowe’s Home Improvement, 176 N.C. App. 229, 237, 625 S.E.2d 613, 620 (2006) (citing *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993)). “If an employee presents substantial evidence he or she is incapable of earning wages, the employer must then come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.” *Barber v. Going West Transp. Inc.*, 134 N.C. App. 428, 435, 517 S.E.2d 914, 920 (1999) (citing *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)).

The Commission entered findings of fact that plaintiff was partially disabled. The Commission’s finding of fact numbered 9 states, “Dr. Brown testified that he would rate plaintiff with a 10% permanent

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partial disability to his back." Based upon this finding, the Commission concluded plaintiff was disabled and entered conclusion of law numbered 2 that "plaintiff was temporarily totally disabled and entitled to receive temporary total disability compensation" until his refusal to return to work.

IV. Refusal to Work

Plaintiff presented no evidence that he attempted to return to work or seek other gainful employment. Defendants argue pursuant to N.C. Gen. Stat. § 97-32 that the Commission correctly found plaintiff was not entitled to further benefits beyond the Commission's award because "[i]f an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." Defendants presented competent evidence to show that "suitable jobs [were] available, [and] also that the plaintiff [was] capable of getting one, taking into account both physical and vocational limitations." *Kennedy*, 101 N.C. App. at 33, 398 S.E.2d at 682. The Commission concluded:

4. Plaintiff was offered sedentary employment at his preinjury wage by defendant but refused to attempt this employment and has not made reasonable efforts to find suitable employment since being released to return to work on 24 February 2003. Plaintiff is therefore not entitled to ongoing weekly disability benefits. N.C.G.S. 97-32.

Competent and uncontradicted evidence in the record supports the Commission's conclusion of law numbered 4. The Commission did not err when it entered findings of fact and conclusions of law that plaintiff was released to return to work on 24 February 2003 and he was capable of, but refused, proffered work. The Commission did not shift the burden of proof to defendants after it had found plaintiff failed to prove he was totally disabled after 24 February 2003.

V. Conclusion

The Commission's findings of fact are supported by competent and uncontradicted evidence in the record and are not insufficient as a matter of law. The Commission's findings of fact support its conclusions of law. I vote to affirm the Commission's opinion and award. I respectfully dissent.

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THOMAS W. HILL, PLAINTIFF v. GARFORD TONY HILL AND WIFE, JEWEL ANNE HILL,
AND THE ESTATE OF SADIE C. HILL, DEFENDANTS

No. COA06-331

(Filed 2 January 2007)

1. Appeal and Error— admission pro hac vice not sought— brief stricken

Defendants' brief was stricken where their attorney was licensed in Florida but not North Carolina and did not follow the requirements of N.C.G.S. § 84-4.1 before submitting the brief. Although she had previously appeared for defendants pro hac vice before the Supreme Court concerning one of plaintiff's petitions for discretionary review, she was required to file a motion with the Court of Appeals before seeking to represent defendants in this proceeding. Furthermore, even if she acted in reliance upon her admission by the Supreme Court, she did not associate local counsel in this appeal.

2. Constitution Law— North Carolina—no right to jury trial on Rule 11 sanctions

Plaintiff was not entitled to a jury trial under the North Carolina Constitution on the Rule 11 issue of whether defendants' counterclaim was filed for an improper purpose. Rule 11 sanctions are punitive and are not an "action respecting property" under article I, section 25 of the Constitution. Moreover, the right to seek sanctions did not exist at common law or pursuant to statute when the 1868 Constitution was adopted. N.C. Const. art. I, §25.

3. Pleadings— Rules 11 sanctions—counterclaim and motion for sanctions—not filed for improper purpose

The trial court did not err by failing to find that defendants' counterclaim and motion for Rule 11 sanctions were filed for an improper purpose where the counterclaim was filed to vindicate defendants' rights under the forfeiture clause in their mother's will, and the record shows that defendant only sought to obtain sanctions against plaintiff for bringing a frivolous claim that was substantially similar to a previous claim which the Court of Appeals had held violated the factual certification requirement of Rule 11.

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4. Appeal and Error—appealability—failure to appeal ruling—issue not appealable in future litigation

Where a party fails to appeal a ruling on a particular issue, he is then bound by that failure and may not revisit the issue in subsequent litigation.

Appeal by plaintiff from orders entered 12 and 21 October 2005 by Judge Yvonne Mims Evans in Henderson County Superior Court. Heard in the Court of Appeals 21 September 2006.

Thomas W. Hill, pro se, plaintiff-appellant.

No brief filed for defendants-appellees.

GEER, Judge.

Plaintiff Thomas W. Hill appeals from two orders of the superior court, the first denying his request for a jury trial on his motion for sanctions under N.C.R. Civ. P. 11, and the second denying his motions for sanctions, attorney's fees, and costs. We conclude that there is no constitutional entitlement to a jury trial on the factual issues underlying a Rule 11 motion for sanctions. Further, because our review of the proceedings below reveals no evidence that could support the entry of such sanctions, we uphold the trial court's denial of plaintiff's Rule 11 motion. Finally, because plaintiff previously failed to challenge, in a prior appeal, the trial court's decision that he was not entitled to costs under Rule 41, we hold that he is precluded from now asserting this issue in the present appeal. We, therefore, affirm the trial court's orders.

Facts

This case presents the fifth and most recent appeal in nearly 10 years of ongoing litigation involving the estate of Sadie C. Hill. Sadie was the mother of five children, including plaintiff and defendant Garford Tony Hill ("Tony"). At various times after the death of her husband, Sadie transferred her interest in the family apple-packing business, an apple orchard containing the family home, and a second parcel of real estate to Tony and Tony's wife (defendant Jewel Anne Hill), the only children active with Sadie in the apple-packing business.

Sadie died in March 1997 and her will divided her assets equally among her children. When the original administratrix of Sadie's estate (plaintiff's sister, Barbara Garrison) declined plaintiff's request that

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she bring suit, plaintiff filed the present action (97 CVS 725) against defendants in May 1997, alleging undue influence and fraud with respect to defendants' business dealings with Sadie and seeking the return of certain property to Sadie's estate. Although the trial court dismissed plaintiff's complaint, this Court later reversed that dismissal. *Hill v. Hill*, 130 N.C. App. 484, 506 S.E.2d 299 (1998) (unpublished), *cert. denied*, 537 S.E.2d 213 (1999).

Following the reversal, plaintiff filed a separate action (99 CVS 67) against a variety of defendants, including those in the present action, alleging misappropriation of corporate funds from the apple-packing business. The trial court entered summary judgment against plaintiff on all of his claims in that action and later awarded defendants their attorneys' fees and costs. This Court affirmed the trial court's award of summary judgment in *Hill v. Hill*, 147 N.C. App. 313, 556 S.E.2d 355 (2001) (unpublished), *appeal dismissed and disc. review denied*, 356 N.C. 301, 570 S.E.2d 507 (2002), and, in a separate opinion, substantially affirmed the fees and costs award, reversing only to the extent the trial court had awarded fees and costs on appeal, *Hill v. Hill*, 173 N.C. App. 309, 622 S.E.2d 503 (2005), *appeal dismissed and disc. review denied*, 360 N.C. 363, 629 S.E.2d 851 (2006).

On remand in this case, defendants filed a counterclaim and moved for sanctions under N.C.R. Civ. P. 11. Plaintiff responded with motions for Rule 11 sanctions as to defendants' counterclaim, attorneys' fees under N.C. Gen. Stat. § 6-21.5 (2005), and costs under N.C.R. Civ. P. 41(d). In January 2003, the trial court granted defendants summary judgment as to plaintiff's claims in this action, and defendants subsequently voluntarily dismissed their counterclaim and motion for Rule 11 sanctions without prejudice. Following plaintiff's appeal, this Court upheld the entry of summary judgment on plaintiff's claims. *Hill v. Hill*, 2004 N.C. App. LEXIS 1632, 2004 WL 1964898, 166 N.C. App. 279, 603 S.E.2d 168 (2004) (unpublished), *appeal dismissed and disc. review denied*, 359 N.C. 280, 609 S.E.2d 769 (2005).

Plaintiff's motion for Rule 11 sanctions, attorneys' fees, and costs in connection with defendants' dismissed counterclaim remained pending after the appeal of the summary judgment ruling. The trial court addressed these motions after taking testimony and considering several exhibits. The court ultimately entered orders denying plaintiff's request for a jury trial on his Rule 11 motion and declining

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to award plaintiff sanctions, attorneys' fees, or costs. Plaintiff timely appealed to this Court.

Discussion

[1] At the outset, we note that defendants' attorney, Cindy Hill Ford, although apparently licensed to practice law in Florida, is not licensed to practice law in North Carolina. "It is well settled that an out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the Court." *State v. Hunter*, 290 N.C. 556, 568, 227 S.E.2d 535, 542 (1976), *cert. denied*, 429 U.S. 1093, 51 L. Ed. 2d 539, 97 S. Ct. 1106 (1977). The conditions under which an out-of-state attorney may be admitted to practice *pro hac vice* in this State are set forth in N.C. Gen. Stat. § 84-4.1 (2005).

Nothing in the record suggests that Ms. Ford complied with the requirements of N.C. Gen. Stat. § 84-4.1 before submitting defendants' brief to this Court. Further, Ms. Ford has since declined to return telephone calls from our Clerk of Court. In the absence of compliance with N.C. Gen. Stat. § 84-4.1, Ms. Ford may not participate in this appeal. *State v. Daughtry*, 8 N.C. App. 318, 319, 174 S.E.2d 76, 77 (1970).

We are aware that Ms. Ford was previously admitted to appear on defendants' behalf *pro hac vice* by the Supreme Court in connection with one of plaintiff's petitions for discretionary review. Nevertheless, prior to seeking to represent defendants in this appellate proceeding, she was required also to file a motion with this Court. *See Selph v. Post*, 144 N.C. App. 606, 609-10, 552 S.E.2d 171, 173 (2001) (noting that out-of-state attorney, who was admitted to practice *pro hac vice* in the trial court, was required to obtain separate permission from this Court in order to appear in connection with an appeal); *see also* N.C. Gen. Stat. § 84-4.1 (out-of-state attorneys may "be admitted to practice . . . for the sole purpose of appearing for a client in the proceeding" (emphases added)).

We note further that even if Ms. Ford acted in reliance upon her admission by the Supreme Court in connection with the petition for discretionary review, she has appeared in this appeal without associating local counsel, contrary to N.C. Gen. Stat. § 84-4.1(5). As our Supreme Court has held, "[t]he legislative requirement of local counsel is . . . mandatory and the court cannot waive it. It has no discre-

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tion in that respect." *In re Smith*, 301 N.C. 621, 632-33, 272 S.E.2d 834, 841 (1981).

Because of Ms. Ford's failure to comply with N.C. Gen. Stat. § 84-4.1 and the absence of any other counsel appearing on behalf of defendants, we are compelled to strike defendants' brief as well as defendants' motions to dismiss and for sanctions. These items have not, therefore, been considered in the resolution of this appeal.

I

[2] Plaintiff first argues that he is entitled to a jury trial as to the factual disputes underlying his Rule 11 motion, namely, whether defendants' counterclaim was filed for an improper purpose. Our case law has not specifically addressed this issue.

The North Carolina Constitution provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25. In construing this provision, our Supreme Court has held that the right to trial by jury applies "only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 517, 385 S.E.2d 329, 331 (1989).

Plaintiff makes no argument—and we can conceive of none—suggesting that there is any property right to be vindicated by receiving a jury trial on the facts underlying a motion for Rule 11 sanctions. Indeed, our Supreme Court concluded in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004), that an award of punitive damages was not "property" specifically because "plaintiff's recovery of punitive damages is fortuitous, *as such damages are assessed solely as a means to punish the willful and wanton actions of defendants* and, unlike compensatory damages, do not vest in a plaintiff upon injury." (Emphasis added.) We find this rationale controlling: Rule 11 sanctions, like punitive damages, are assessed only as punishment for the improper actions of the opposing party. A party's entitlement to Rule 11 sanctions is not, therefore, an action respecting property, and the trial court properly denied plaintiff's request for a jury trial.

Additionally, Rule 11 was enacted by our legislature in 1967, long after the 1868 Constitution. Thus, because the right to seek Rule 11 sanctions "did not exist at common law or pursuant to statute in 1868," and Rule 11 itself does not explicitly provide a right to a jury

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trial, no such right exists. *See State v. Morris*, 103 N.C. App. 246, 250, 405 S.E.2d 351, 353 (1991) (concluding that no jury trial right existed for applications for remission of forfeiture when right did not exist at common law or pursuant to statute in 1868, and the governing statutes did not create such a right).

This conclusion is further bolstered by this Court's decision in *Martin v. Solon Automated Servs., Inc.*, 84 N.C. App. 197, 201-02, 352 S.E.2d 278, 281, *appeal dismissed and disc. review denied*, 319 N.C. 674, 356 S.E.2d 789 (1987), in which we held that trial court orders imposing discovery sanctions—without a jury trial—do “not deny appellants’ right to due process or trial by jury.” There is no meaningful distinction for purposes of the right to a jury trial between Rule 11 sanctions and discovery sanctions. *See Brisson v. Santoriello*, 351 N.C. 589, 595, 528 S.E.2d 568, 571 (2000) (holding that separate rules of civil procedure addressing the same subject matter must be construed *in pari materia* and harmonized). This assignment of error is, accordingly, overruled.

II

[3] Plaintiff next argues that, even if he was not entitled to a jury trial under Rule 11, the trial court erred by declining to enter Rule 11 sanctions against defendants for the filing of their counterclaim and motion for Rule 11 sanctions against plaintiff. Rule 11 provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose

N.C.R. Civ. P. 11(a). When reviewing the decision of a trial court to grant or deny a motion to impose sanctions under Rule 11, we must determine whether the findings of fact of the trial court are supported by sufficient evidence, whether the conclusions of law are supported by the findings of fact, and whether the conclusions of law support the judgment. *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

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Plaintiff's original complaint alleged fraud and undue influence by defendants with respect to their business transactions with Sadie. Plaintiff sought—among other things—the return of certain property to Sadie's estate and limitations on defendants' capacity to inherit from property “recovered as a result of this action.” In response, defendants' counterclaim pointed to a forfeiture clause in Sadie's will, which provided that any beneficiary who contests “any of [Sadie's] legal transactions during [her] lifetime” forfeited the beneficiary's inheritance under the will, and sought a declaration that plaintiff had forfeited his right to share in Sadie's estate. Defendants also sought the imposition of sanctions under Rule 11 against plaintiff.

In denying plaintiff's motion for Rule 11 sanctions based upon defendants' counterclaim and Rule 11 motion, the trial court found that there was no “evidence that could support a finding that the Defendants or their counsel violated Rule 11 in any respect” On appeal, plaintiff argues only that the trial court erred by not finding that defendants' counterclaim and Rule 11 motion were filed for an improper purpose.

“[T]he improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements.’” *Brooks v. Giese*, 334 N.C. 303, 315, 432 S.E.2d 339, 345 (1993) (quoting *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992)). As a result, even if a paper is well-grounded in fact and law, it may still have been served or filed for an improper purpose, and, therefore, violate Rule 11. *Id.*, 432 S.E.2d at 345-46.

Our courts have held that “[a]n improper purpose is ‘any purpose other than one to vindicate rights . . . or to put claims of right to a proper test.’” *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996) (quoting *Mack v. Moore*, 107 N.C. App. 87, 93, 418 S.E.2d 685, 689 (1992)). *See also Bryson*, 330 N.C. at 663, 412 S.E.2d at 337 (improper purpose is when litigant hopes only “to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay”). Whether a paper was filed for an improper purpose is reviewed under an objective standard, with the moving party bearing the burden of proving an improper purpose. *Mack*, 107 N.C. App. at 93, 418 S.E.2d at 689. “[T]he relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior.” *Id.* A movant's subjective belief that a paper has been filed for an improper purpose is immaterial. *Id.* “There must be a strong infer-

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ence of improper purpose to support imposition of sanctions.” *Bass v. Sides*, 120 N.C. App. 485, 488, 462 S.E.2d 838, 840 (1995), cert. denied, 342 N.C. 651, 467 S.E.2d 703 (1996).

Plaintiff contends that defendants’ counterclaim and Rule 11 motion were filed for the “improper purpose” of forcing him to abandon his attempt to recover assets formerly belonging to his mother. When viewed under an objective standard, however, the evidence indicates that the counterclaim was filed to vindicate defendants’ rights under the forfeiture clause in Sadie’s will. Although plaintiff complains that defendants and their counsel were threatening to deprive him of property should he persist in litigation, that is indeed what the forfeiture clause provided.¹

Similarly, as to defendants’ motion for Rule 11 sanctions, the evidence in the record objectively indicates only that defendants sought to obtain sanctions against plaintiff for bringing a frivolous claim. Given that this Court concluded in *Hill*, 173 N.C. App. at 314, 622 S.E.2d at 507, that plaintiff had “violated the factual certification requirement” of Rule 11 when he brought a substantially similar action against these and other defendants, we cannot now conclude that defendants’ motion for Rule 11 sanctions against plaintiff for bringing similarly factually dubious claims was somehow improper. The trial court did not, therefore, err in finding no evidence of an improper purpose. This assignment of error is overruled.

III

[4] Finally, plaintiff argues that he is entitled to recover the costs of defending against defendants’ counterclaim under N.C.R. Civ. P. 41(d). In *Hill*, 2004 N.C. App. LEXIS 1632 at *17, 2004 WL 1964898 at *5, however, this Court addressed plaintiff’s argument that under “Rule 41(d), defendants must be taxed with the costs of plaintiff’s counterclaim defense.” We concluded that plaintiff had failed to assign error to this issue, and, accordingly, declined to consider plaintiff’s argument. *Id.* See also N.C.R. App. P. 10(a) (“[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal”).

When a party fails to appeal a ruling on a particular issue, he is then bound by that failure and may not revisit the issue in subsequent litigation. See *In re Estate of Lunsford*, 160 N.C. App. 125, 129 n.1, 585

1. Nothing in this opinion should be construed as expressing any view as to the enforceability of the forfeiture clause.

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S.E.2d 245, 248 n.1 (2003) (dismissing, on second appeal, appellant's constitutional statutory challenge because appellant failed to raise the issue in his first appeal), *rev'd on other grounds*, 359 N.C. 382, 610 S.E.2d 366 (2005). Plaintiff may not now, in a subsequent appeal, circumvent his prior decision to not assign error to the trial court's denial of his motion for costs under N.C.R. Civ. P. 41(d). Accordingly, this assignment of error is overruled.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.



NORMA G. HOLLIN, EMPLOYEE, PLAINTIFF v. JOHNSTON COUNTY COUNCIL ON AGING, EMPLOYER LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA06-310

(Filed 2 January 2007)

1. Workers' Compensation— going and coming rule—traveling salesman exception—not applicable to home health aid with fixed hours and patients

The workers' compensation traveling salesman exception to the going and coming rule did not apply to a home health aid who was injured as she traveled from her home to the home of the first patient of the day. Plaintiff had fixed hours and the same patients every week.

2. Workers' Compensation— going and coming rule—contractual duty exception—home health aid not reimbursed for first visit of the day—agreed policy at hiring

The workers' compensation contractual duty exception to the going and coming rule did not apply to a home health aid as she traveled from her home to the home of the first patient of the day. Plaintiff was not reimbursed for expenses in traveling to the first patient's home in the morning, and she understood and agreed to this policy when she was hired.

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3. Workers' Compensation— use of personal vehicle required—covered by Act

The Workers' Compensation Act covers injuries to employees who are required to furnish a personal vehicle as part of their employment and who are injured going to or coming from work. The public at large can choose its mode of transportation, but the home health aid in this case was required to use her vehicle as part of her employment.

Appeal by plaintiff from an opinion and award entered 14 November 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 October 2006.

Brent Adams & Associates, by Brenton D. Adams and Sheila W. Chavis, for plaintiff-appellant.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Tonya D. Davis and Bettina Mumme, for defendant-appellees.

HUNTER, Judge.

Norma G. Hollin ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission") denying her claim for benefits pursuant to the Workers' Compensation Act. Plaintiff argues that, as she was required to provide her own vehicle for transportation as part of her employment as a health care aide with the Johnston County Council on Aging ("defendant"), the injuries she sustained while traveling to her worksite arose out of and in the course of employment. We agree and therefore reverse the opinion and award of the Commission.

Plaintiff's case came before the Commission on 27 June 2005. The evidence tended to show that plaintiff was employed by defendant as a health care aide providing assistance to patients in their homes. Plaintiff saw the same patients each week and worked regular hours from 8:00 a.m. in the morning until 4:00 p.m. in the afternoon, Monday through Friday. Plaintiff was required to use her own personal vehicle for transportation to her patients' homes, and received reimbursement for travel between patients' homes. However, as part of defendant's company policy, plaintiff was not considered to be working or "on the clock" while traveling from her residence to her first patient's home in the morning and from her last patient's home in the afternoon back to her residence,

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and she did not receive reimbursement for such travel. Plaintiff earned \$6.72 per hour in addition to 31¢ for each mile she traveled between job sites.

On 20 May 2003, plaintiff was traveling to the home of her first patient for the day when she was involved in a head-on collision with another vehicle. As a result of the accident, plaintiff sustained severe injuries to both legs and underwent several surgeries. Plaintiff resigned from her employment with defendant on 16 June 2003 due to the severity of her injuries and the extended period of time she would require to recover.

After considering the evidence, the Commission concluded that plaintiff's injury did not arise "in the course of" her employment and entered an opinion and award denying her claim to benefits. Plaintiff appeals.

"This Court's review of a decision of the Full Commission is limited to determining whether competent evidence supports the Full Commission's findings of fact, and whether the Full Commission's findings of fact support its conclusions of law." *Munoz v. Caldwell Mem'l Hosp.*, 171 N.C. App. 386, 389, 614 S.E.2d 448, 451 (2005). "However, questions of law are reviewed *de novo*." *Nicholson v. Edwards Wood Prods.*, 175 N.C. App. 773, 776, 625 S.E.2d 562, 564 (2006). The question of whether a claimant's injury arises in the course of employment is a mixed question of law and fact. *Munoz*, 171 N.C. App. at 389, 614 S.E.2d at 451. Here, plaintiff does not challenge the Commission's findings, but rather its conclusions of law. We must therefore determine whether the Commission's findings support its conclusion of law that plaintiff's injury did not arise out of and in the course of her employment.

"An employee is entitled to workers' compensation benefits for injuries sustained in an accident arising out of and in the course of employment." *Hunt v. Tender Loving Care Home Care Agency, Inc.*, 153 N.C. App. 266, 269, 569 S.E.2d 675, 678 (2002). The term "arising out of" refers to the cause of the accident, while the term "in the course of" refers to the time, place, and circumstances in which an accident occurred. *Id.* "The accident must happen during the time and at the place of employment." *Id.*

The "going and coming rule" provides that "injuries sustained by an employee while going to or from work are not ordinarily

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compensable' because the injuries do not arise out of or in the course of employment." *Munoz*, 171 N.C. App. at 389, 614 S.E.2d at 451 (quoting *Bass v. Mecklenburg County*, 258 N.C. 226, 231-32, 128 S.E.2d 570, 574 (1962)). This is because "the risk of injury while traveling to and from work is one common to the public at large," *Munoz*, 171 N.C. App. at 389, 614 S.E.2d at 451 (quoting *Creel v. Town of Dover*, 126 N.C. App. 547, 555, 486 S.E.2d 478, 482 (1997)), and "[a]n employee is not engaged in the business of the employer while driving his or her personal vehicle to the place of work or while leaving the place of employment to go home." *Hunt*, 153 N.C. App. at 269, 569 S.E.2d at 678. However, the going and coming rule is subject to the following exceptions:

"(1) an employee is going to or coming from work but is on the employer's premises when the accident occurs (premises exception); (2) the employee is acting in the course of his employment and in the performance of some duty, errand, or mission thereto (special errands exception); (3) an employee has no definite time and place of employment, requiring her to make a journey to perform a service on behalf of the employer (traveling salesman exception); or (4) an employer contractually provides transportation or allowances to cover the cost of transportation (contractual duty exception)."

Munoz, 171 N.C. App. at 390, 614 S.E.2d at 451 (quoting *Stanley v. Burns Int'l Sec. Servs.*, 161 N.C. App. 722, 725, 589 S.E.2d 176, 178 (2003) (citations omitted)).

In the instant case, the Commission rejected plaintiff's arguments that two exceptions to the going and coming rule apply to her case: the "traveling salesman" exception and the "contractual duty" exception. The "traveling salesman" exception states that "[i]f travel is contemplated as part of the employment, an injury from an accident during travel is compensable." *Hunt*, 153 N.C. App. at 269, 569 S.E.2d at 678. Such claims are compensable because "employees with no definite time and place of employment . . . are within the course of their employment when making a journey to perform a service on behalf of their employer." *Creel*, 126 N.C. App. at 556-57, 486 S.E.2d at 483. The applicability of the "traveling salesman" exception to a particular case "depends upon the determination of whether [the] plaintiff had fixed job hours and a fixed job location." *Munoz*, 171 N.C. App. at 390, 614 S.E.2d at 451 (quoting *Hunt*, 153 N.C. App. at 270, 569 S.E.2d at 678).

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[1] Applying the traveling salesman exception to the instant case, the Commission found that plaintiff “worked from 8:00 a.m. in the morning until 4:00 p.m. in the afternoon, Monday through Friday.” Although plaintiff worked with patients in their individual homes, plaintiff worked with the same patients each week. The Commission also found that “[p]laintiff would see these same patients until the patient died, got sick, or no longer needed her services.” Based on these findings, the Commission concluded that:

Because plaintiff had fixed work hours and saw the same patients each week, her situation is different from a true traveling salesman who might visit a different customer each day. Plaintiff saw the same patients week after week, traveled to the same homes week after week, and therefore she had fixed work locations. Therefore, the traveling salesman exception does not apply to this case.

The findings of fact support the Commission’s determination that the traveling salesman exception does not apply to the instant case. *See Hunt*, 153 N.C. App. at 269-70, 569 S.E.2d at 678-79.

[2] We also agree with the Commission that the “contractual duty” exception does not apply to plaintiff’s claim. “The ‘contractual duty’ exception provides that where an employer provides transportation or allowances to cover the cost of transportation, injuries occurring while going to or returning from work are compensable.” *Id.* at 270, 569 S.E.2d at 679. “Where the cost of transporting employees to and from work is made an incident to the contract of employment, compensation benefits have been allowed.” *Id.* Although plaintiff was reimbursed for travel as part of her job, plaintiff admitted that she was not reimbursed for travel to the first patient’s home in the morning and from the last patient’s home to her home in the afternoon. Plaintiff understood and agreed to this policy at the time she was hired by defendant. Plaintiff was injured as she was traveling to her first patient’s home. The Commission concluded that “[p]laintiff was only paid travel reimbursement for travel between patients’ homes and defendant-employer did not transport any employees to and from work. Therefore, the contractual duty exception does not apply in this case.” The Commission’s conclusions are supported by its findings.

[3] We nevertheless agree with plaintiff that her claim was compensable. Plaintiff was required as a condition of employment to use her

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personal vehicle while at work. “If the employee as part of his or her job is required to bring along his or her own car, truck or motorcycle for use during the working day, the trip to and from work is by that fact alone embraced within the course of employment.” 1 Arthur Larson, *Larson’s Workers’ Compensation Law* § 15.05(1) (2006). Professor Larson notes that the reasoning behind the rule

is in part related to that of the employer-conveyance cases: the obligations of the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise he or she would have the option of avoiding. But in addition there is at work the factor of making the journey part of the job, since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer’s purposes. . . .

Id. at § 15.05(2).

This rule is followed in a great number of jurisdictions. See, e.g., *Olsten Kimberly Quality Care v. Pettey*, 944 S.W.2d 524, 527 (Ark. 1997); *Smith v. Workmen’s Compensation Appeals Board*, 447 P.2d 365, 373 (Cal. 1968); *Whale Communications v. Osborn*, 759 P.2d 848, 848 (Colo. Ct. App. 1988); *Poinciana Village Const. Corp. v. Gallarano*, 424 So. 2d 822, 823 (Fla. Dist. Ct. App. 1982); *Pittsburgh Testing Laboratories v. Kiel*, 167 N.E.2d 604, 606-07 (Ind. App. 1960); *Medical Assoc. Clinic v. First Nat. Bank*, 440 N.W.2d 374, 375-76 (Iowa 1989); *Prothro v. Louisiana Paving Co., Inc.*, 399 So. 2d 1229, 1230 (La. App. 1981); *Alitalia v. Tornillo*, 603 A.2d 1335, 1343 (Md. 1992); *Gilbert v. Star Tribune/Cowles Media*, 480 N.W.2d 114, 115 (Minn. 1992); *White v. Atlantic City Press*, 313 A.2d 197, 200 (N.J. 1973); *Weatherbee Electric Company v. Duke*, 294 P.2d 298, 301 (Okla. 1955); *Liberty Northwest Ins. Corp. v. Over*, 810 P.2d 876, 877-78 (Or. App. 1991); *Toolin v. Aquidneck Island Med. Resource*, 668 A.2d 639, 641 (R.I. 1995); *Bailey v. Utah State Industrial Commission*, 398 P.2d 545, 547 (Utah 1965).

For example, in a case strikingly similar to the present one, the Supreme Court of Arkansas held that an in-home nurse’s assistant who was injured on her way to the home of her first patient of the day was entitled to workers’ compensation benefits. *Olsten Kimberly Quality Care*, 944 S.W.2d at 527. The claimant used her own vehicle for travel to and from her patients’ homes, but received

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no wages for travel time, and was not reimbursed for travel expenses. *Id.* at 525. The *Olsten* Court noted that the “‘going and coming’ rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment.” *Id.* at 527. It was nevertheless

evident that [the claimant] was required by the very nature of her job description to submit herself to the hazards of day-to-day travel in her own vehicle, back and forth to the homes of her patients. As such, [the claimant] was acting within the course of her employment with [defendant-employer] at the time her injuries were sustained.

Id. The Court reasoned: “It is . . . clear that delivering nursing services to patients at their homes is the *raison d'etre* of the [employer's] business, and that traveling to patients' homes is an essential component of that service.” *Id.* (citation omitted).

Defendant argues that this Court’s decision in *Franklin v. Board of Education*, 29 N.C. App. 491, 224 S.E.2d 657 (1976), prevents adoption of a rule providing compensation benefits where an employee is required to furnish their own conveyance and is injured on the way to the worksite. In *Franklin*, the claimant’s decedent was a teacher employed at two schools located several miles apart. *Id.* at 492, 224 S.E.2d at 658. She received traveling expenses to drive her personal vehicle between the two. *Id.* She was killed in an automobile accident when she backed her car out of the school parking lot and onto the highway. The point of impact was on the highway. *Id.* at 493, 224 S.E.2d at 659. The day she was killed, she had finished teaching at one school, and had driven to the other school to pick up her paycheck. She was killed after picking up her paycheck. *Id.* The Commission concluded that the decedent’s death did not arise out of and in the course of her employment and denied benefits. *Id.* at 494, 224 S.E.2d at 660. Upon appeal, this Court agreed with the Commission, as there was no evidence to show that the decedent was on employer-related business when she was killed. *Id.* at 495, 224 S.E.2d at 660. The Court never addressed the issue, however, of whether the claimant should be entitled to compensation because she was required to furnish her own vehicle, and it is unclear whether such a claim was ever raised before the Court. As such, we do not agree that *Franklin* operates to bar plaintiff’s claim.

Defendant further argues that adoption of the rule would eliminate the contractual duty exception. We do not agree. This rule will

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expand, not eliminate the contractual duty exception. As Professor Larson cautions,

care must be exercised not to confuse these cases with the more common cases [involving contractual duty exceptions] in which attention is focused exclusively on the journey itself—in particular, on the question: was the employee paid for the time or expenses of the journey itself? In the present category, it is immaterial whether the employee is compensated for the time or expenses of the journey, since work-connection is independently established by the fact of conveying the vehicle to the operating premises. Indeed, it is quite common in these cases to find that the employee is reimbursed for his or her mileage after he or she reaches the premises and until he or she leaves for home, but specifically not for the going and coming trip. Yet the going and coming trip has repeatedly been held covered in these circumstances.

Larson at § 15.05(2) (footnote omitted).

It is well established in North Carolina that the Workers' Compensation Act should be liberally construed and that “ “[w]here any reasonable relationship to employment exists, or employment is a contributory cause, the court is justified in upholding the award as ‘arising out of employment.’ ” *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E.2d 702, 704 (1963) (quoting *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960)). We find the reasoning of *Olsten Kimberly Quality Care* and the many jurisdictions that follow the rule expressed in *Larson*'s highly persuasive, and we hold that where an employee who is required to furnish their own vehicle as part of their employment is injured going to or coming from work, such injuries are covered by the Workers' Compensation Act. See *Kiger*, 260 N.C. at 762, 133 S.E.2d at 704. Plaintiff here was required to furnish her own vehicle for her employer's use in providing in-home care to patients. “[D]elivering nursing services to patients at their homes is the *raison d'être* of [defendant's] business, and . . . traveling to patients' homes is an essential component of that service.” *Olsten Kimberly Quality Care*, 944 S.W.2d at 527 (citation omitted). Plaintiff was traveling to her first patient's home at the time she sustained her injuries. She was required to travel there in her own vehicle, and so was “required by the very nature of her job description to submit herself to the hazards of day-to-day travel . . . back and forth to the homes of her patients.” *Id.* Unlike the public at large, who may choose their mode of transportation, plaintiff was required to

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use her private vehicle as part of her employment. "As such, [plaintiff] was acting within the course of her employment with [defendant] at the time her injuries were sustained." *Id.*

In conclusion, we hold plaintiff is entitled to benefits under the Workers' Compensation Act. We therefore reverse the opinion and award denying plaintiff benefits and remand this case to the Commission for entry of an opinion and award consistent with this opinion.

Reversed and remanded.

Judges HUDSON and CALABRIA concur.

Judge HUDSON concurred in this opinion prior to 31 December 2006.

OKUMA AMERICA CORPORATION, PLAINTIFF v. PHILLIP N. BOWERS, DEFENDANT

No. COA06-472

(Filed 2 January 2007)

Employer and Employee— covenant not to compete—factual issues concerning reasonableness—12(b)(6) not appropriate

A motion to dismiss for failure to state a claim in a covenant not to compete case should not have been granted. The enforceability of the covenant rested on factual questions such as whether the geographic effect of the client-based restrictions was excessive in light of defendant's contacts with customers, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues relating to how closely the geographic limits fit with defendant's work for plaintiff.

Appeal by plaintiff from order entered 29 November 2005 by Judge Richard D. Boner in Superior Court, Mecklenburg County. Heard in the Court of Appeals 14 November 2006.

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Robinson, Bradshaw & Hinson, P.A., by Douglas M. Jarrell and Jonathan C. Krisko, for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Gary S. Hemric, Preston O. Odom, III, Adam L. Ross, and Fred P. Parker, IV, for defendant-appellee.

WYNN, Judge.

When considering the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests.¹ Here, Plaintiff Okuma America Corporation appeals the trial court's grant of Defendant Phillip Bowers's Rule 12(b)(6) motion, finding that the covenant in question was "overly broad and unenforceable as a matter of law." Because we find that the covenant's enforceability in this case rests on questions of fact and cannot be determined as a matter of law, we conclude that the allegations of Okuma America's complaint, when taken as true, did state a claim for which relief might be granted on some legal theory. We therefore reverse and remand.

The record shows that Mr. Bowers worked for Okuma America, a leader in the production of machine tooling technology, for approximately seventeen years, the last two years as Vice President for Customer Service. In that position, Mr. Bowers oversaw more than twenty-five personnel and maintained relationships with Okuma America's more than thirty distributors in forty locations. Okuma America further claims that Mr. Bowers served on the Corporate Planning Committee, a small group of six senior executives charged with directing major strategic and operational decisions for the company as a whole.

In 2002, Mr. Bowers signed an Employment Agreement with Okuma America agreeing that, in exchange for additional bonuses, separation pay, and other incentives, for the six months following the end of his employment with Okuma America, he would not

Become employed by (as an officer, director, employee, consultant or otherwise), or otherwise become commercially interested in or affiliated with (whether through direct, indirect, actual or beneficial ownership or through a financial interest), a

1. See *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 407, 302 S.E.2d 754, 763 (1983).

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COMPETITOR, unless Employee accepts employment with a COMPETITOR in an area of the COMPETITOR'S business which does not compete with the Company. For purposes of this Agreement, a COMPETITOR shall be defined as any entity operating as a manufacturer, distributor, or seller of machine tools that are substantially similar to machine tools manufactured, distributed or sold by the Company.

During the same six-month period, Mr. Bowers agreed not to “[s]olicit or attempt to solicit . . . the business of any of the Company's clients or customers for which Employee has rendered any services.” Furthermore, the agreement stated that

In recognition of the broad geographic scope of the Company's business and of the ease of competing with that business in any part of the United States, the restrictions on competition set forth herein are intended to cover the following geographic areas: [list:
Note: this is limited by law to areas in which the Company does business].

(Bold in original).

At the beginning of January 2005, Okuma America senior management informed Mr. Bowers of their decision to transfer him from a managerial role to one limited to analytical duties; his salary and other benefits would remain roughly the same, but he would no longer supervise employees in a managerial capacity. Rather than accept the transfer, which he considered to be a demotion, Mr. Bowers decided to resign from the company, effective 1 February 2005. Although not required to do so, Okuma America agreed to make separation payments to Mr. Bowers, and Mr. Bowers signed a release as to all claims, as well as an agreement to maintain as confidential information that was proprietary to Okuma America.

In May 2005, three months after leaving Okuma America, Mr. Bowers became the Vice President for Customer Service at DMG America, Inc., a direct competitor of Okuma America in the machine tooling industry. Thereafter, Okuma America sent Mr. Bowers a cease-and-desist letter, informing him that he was violating the terms of the covenant not to compete in his Employment Agreement. After getting no response from Mr. Bowers, on 17 June 2005, Okuma America brought this action for breach of the agreement. Mr. Bowers responded with a motion to dismiss filed on 4 October 2005. On 29 November 2005, Superior Court Judge Richard D. Boner granted the

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motion to dismiss based on Rule 12(b)(6), for the failure to state a claim for which relief could be granted. Okuma America now appeals that order, arguing that the trial court erred in dismissing its complaint because it adequately pleaded a breach of a valid and enforceable covenant not to compete.²

We note at the outset that appellate review of the dismissal of an action under Rule 12(b)(6) is subject to more stringent rules than other procedural postures that come before us. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005); *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 880 (2000). Here, we are presented with the question of whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief can be granted under some legal theory. *See id.* We therefore accept as true the well-pleaded factual allegations of the complaint and review the case *de novo* “to test the law of the claim, not the facts which support it.” *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979) (quotation and citation omitted); *see also Locklear v. Lanuti*, 176 N.C. App. 380, 384, 626 S.E.2d 711, 714 (2006). Thus, we examine “whether the non-compete agreement is enforceable as a matter of law. If not, then the trial court properly granted [the] motion to dismiss the claim.” *Baskin*, 138 N.C. App. at 279, 530 S.E.2d at 880; *but see Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 224, 367 S.E.2d 647, 652 (1988) (on a Rule 12(b)(6) motion, declining to consider whether a covenant not to compete was unenforceable as a matter of law after finding that the facts alleged would not have constituted a breach of the language of the covenant itself).

Under North Carolina law, a covenant not to compete is valid and enforceable if it is (1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and, (5) designed to protect a legitimate business interest of the employer. *Baskin*, 138 N.C. App. at 279, 530 S.E.2d at 881; *see also A.E.P. Indus. v. McClure*, 308 N.C. 393, 402-03, 302 S.E.2d 754, 760 (1983). Here, the first three criteria are not in dispute; the covenant meets all three of those requirements, and Mr. Bowers does not claim otherwise. Our inquiry thus focuses on whether the terms are reasonable as to time and territory and whether they were designed to protect a legitimate business interest.

2. We observe that the grant of the Rule 12(b)(6) motion was based only on the unenforceability of the covenant not to compete as a matter of law, not whether a breach of its terms actually occurred. As such, the question of a breach is not before us on appeal.

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When considering the time and geographic limits outlined in a covenant not to compete, we look to six overlapping factors:

(1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Hartman v. W.H. Odell & Assocs., Inc., 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994), *disc. review denied*, 339 N.C. 612, 454 S.E.2d 251 (1995).

Additionally, the time and geographic limitations of a covenant not to compete must be considered in tandem, such that “[a] longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*.” *Baskin*, 138 N.C. App. at 280, 530 S.E.2d at 881 (citing *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E.2d 840 (1968)). “Although either the time or the territory restriction, standing alone, may be reasonable, the combined effect of the two may be unreasonable.” *Id.* Nevertheless, the scope of the geographic restriction must not be any wider than is necessary to protect the employer’s reasonable business interests. *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002) (citing *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 229, 393 S.E.2d 854, 857 (1990)). Thus, to show reasonableness of a geographic restriction, “an employer must first show where its customers are located and that the geographic scope of the covenant is necessary to maintain those customer relationships.” *Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. Our Supreme Court has also recognized the validity of geographic restrictions that are limited not by area, but by a client-based restriction. *See, e.g., United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 660, 370 S.E.2d 375, 386 (1988).

The covenant not to compete in the instant case barred Mr. Bowers from employment with a direct competitor of Okuma America, or from soliciting business from Okuma America’s customers, for the six-month period following the termination of his employment with Okuma America. That six-month restriction is well within the established parameters for covenants not to compete in this State. *See Baskin*, 138 N.C. App. at 280, 530 S.E.2d at 881 (“A five-year time restriction is the outer boundary which our courts have considered reasonable . . .”); *see also Precision Walls*, 152 N.C. App.

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at 638, 568 S.E.2d at 273 (finding a one-year time restriction to be reasonable); *Harwell Enterprises, Inc. v. Heim*, 276 N.C. 475, 481, 173 S.E.2d 316, 320 (1970) (upholding a two-year restriction). Thus, in determining the overall reasonableness of the covenant not to compete in question, we evaluate the geographic restriction in light of the relatively short, six-month duration of the time restriction.

The language in the covenant not to compete states that the agreement's restrictions are limited to "areas in which [Okuma America] does business," suggesting that it is a client-based, rather than geographic, limitation. Nevertheless, because Okuma America operates throughout both North and South America, the geographic effect of the restriction is quite broad. However, when taken in conjunction with the six-month duration, it is not *per se* unreasonable in light of our courts' past rulings. *See Heim*, 276 N.C. at 481, 173 S.E.2d at 320 (upholding a nationwide restriction); *Clyde Rudd & Assocs., Inc. v. Taylor*, 29 N.C. App. 679, 684, 225 S.E.2d 602, 605 (upholding a multistate restriction due in part to insufficient findings of fact as to scope of employee's responsibilities), *disc. review denied*, 290 N.C. 659, 228 S.E.2d 451 (1976); *but see Baskin*, 138 N.C. App. at 283, 530 S.E.2d at 883 (affirming Rule 12(b)(6) dismissal of a three-year client-based restriction covering forty-one states and four foreign countries that had practical effect of five-year limitation). Rather, we must determine whether the scope is in fact "any wider than is necessary to protect the employer's reasonable business interests," *Precision Walls*, 152 N.C. App. at 638, 568 S.E.2d at 273, in light of where Okuma America's customers are located, and if the scope is necessary to maintain its existing customer relationships.

In North Carolina, "[t]he protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate interest of an employer." *Baskin*, 138 N.C. App. at 280, 530 S.E.2d at 881 (citing *Kuykendall*, 322 N.C. at 651, 370 S.E.2d at 381). Additionally, a covenant is reasonably necessary for the protection of a legitimate business interest "if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers." *Kuykendall*, 322 N.C. at 650, 370 S.E.2d at 380 (citing *McClure*, 308 N.C. at 408, 302 S.E.2d at 763) (internal quotation and citations omitted)).

This Court has also held that restrictions barring an employee from working in an identical position for a direct competitor are valid

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and enforceable. *See Precision Walls*, 152 N.C. App. at 638-39, 568 S.E.2d at 273 (finding a one-year, two-state restriction against employment with a direct competitor to be reasonable and within a legitimate business interest); *but see VisionAIR, Inc. v. James*, 167 N.C. App. 504, 508-09, 606 S.E.2d 359, 362-63 (2004) (finding a two-year restriction against employment with “similar businesses” throughout the Southeast to be unreasonable); *Henley Paper Co. v. McAllister*, 253 N.C. 529, 534-35, 117 S.E.2d 431, 434 (1960) (finding a non-compete covenant overbroad and unenforceable where it “excludes the defendant from too much territory and from too many activities”). Thus, a covenant not to compete is

overly broad in that, rather than attempting to prevent [the former employee] from competing for [] business, it requires [the former employee] to have no association whatsoever with any business that provides [similar] services. . . . Such a covenant would appear to prevent [the former employee] from working as a custodian for any “entity” which provides [similar] services.

Hartman, 117 N.C. App. at 317, 450 S.E.2d at 920.

In the instant case, Okuma America’s complaint alleges that Mr. Bowers’s position as Vice President of Customer Service made him one of the six most senior executives in the company. In that role, Okuma America asserts that Mr. Bowers “participated . . . in the most critical and strategic decisions made by the company,” in addition to becoming familiar with and administering the company’s customer service blueprint and organization, such that the client-based restriction, even if broad in geographic scope, was necessary to protect its legitimate business interest. Okuma America further alleges, and Mr. Bowers does not dispute, that he took an identical position—as Head of Customer Service—with DMG America in its business unit that sells and services machine tools. When taken as true, as we must when considering an appeal from the grant of a Rule 12(b)(6) motion, these allegations are sufficient to show that Okuma America was acting to protect a legitimate business interest when it drafted the terms of the covenant not to compete.

Moreover, the language of the covenant not to compete does not bar Mr. Bowers from any or all employment in the field of either customer service or machine tooling technology. Rather, he is barred only from employment with a direct competitor, “unless . . . in an area of the competitor’s business which does not compete with [Okuma America].” By allowing for employment with a direct

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competitor in a capacity unrelated to Okuma America's business, the terms thread the needle between those in *Precision Walls*, which were found to be valid and enforceable, and those in *VisionAIR*, which were struck down. *Precision Walls*, 152 N.C. App. at 638-39, 568 S.E.2d at 273; *VisionAIR*, 167 N.C. App. at 508-09, 606 S.E.2d at 362-63. Additionally, although the geographic effect of the client-based restriction in the case at hand is broader than that in either *Precision Walls* or *VisionAIR*, the six-month time period is shorter in duration.

According to the facts alleged in the complaint, Mr. Bowers held a much more senior position than those in question in either *Precision Walls* or *VisionAIR*. In light of our ruling in *Hartman*, to consider "the nature of the employee's duty and his knowledge of the employer's business operation," 117 N.C. App. at 312, 450 S.E.2d at 917, when examining the time and geographic restrictions of a covenant not to compete, we are unable to conclude that a covenant restricting employment for six months with a direct competitor in a related capacity, even with a geographic scope potentially extending throughout North and South America due to the client-based restrictions, is overly broad and unenforceable as a matter of law. In this case, the enforceability of the covenant not to compete rests on factual questions such as whether the geographic effect of the client-based restriction is excessive in light of Mr. Bowers' actual contacts with customers, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues relating to how closely the geographic limits fit with Mr. Bowers's work for Okuma America.

Accordingly, we hold that, when taken as true, Okuma America's complaint stated a claim for which relief might be granted.

Reversed and remanded.

Judge BRYANT concurs.

Judge STEPHENS concurs prior to 31 December 2006.

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STATE OF NORTH CAROLINA v. ROGER ALAN POINTER

No. COA06-181

(Filed 2 January 2007)

1. Assault— specific intent to kill—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss charges of assault with intent to kill inflicting serious injury where defendant presented expert testimony that he could not have formed the specific intent to kill due to mental disorders and an excessive dose of medication, and the State presented evidence of the nature of the assaults.

2. Criminal Law— jury impaneled after opening argument—harmless error

The trial court's error in not impaneling the jury until after the State's opening argument was harmless.

3. Jury— request to view evidence—jury not returned to courtroom—appeal waived

Defendant waived any assertion of error in the court not bringing the jury back to the courtroom after its requests to review evidence by consenting to the court communicating with the jury by sending exhibits or writing a note explaining the denial of the jury's requests.

4. Appeal and Error— preservation of issues—lack of argument or authority

An assignment of error was deemed abandoned where defendant did not state any supporting reasoning or argument or cite authority.

Appeal by defendant from judgment entered 12 August 2005 by Judge Robert C. Ervin in Lincoln County Superior Court. Heard in the Court of Appeals 12 October 2006.

Attorney General Roy C. Cooper, by Assistant Attorney General Jane L. Oliver, for the State.

Haral E. Carlin for defendant-appellant.

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STEELMAN, Judge.

Defendant appeals two convictions of assault with a deadly weapon with intent to kill inflicting serious injury because he asserts that he did not have the ability to form the intent to kill. For the reasons stated herein, we find no prejudicial error.

Factual Background

The State's evidence tended to show that Kimberly Rogers ("Rogers") invited her brother, Roger Allen Pointer ("defendant"), to live with her in Lincolnton, North Carolina in 2002. Rogers lived with her three children: Seth, age sixteen; Karissa, age thirteen; and, Tiffany, age twelve. It was agreed that defendant would obtain employment and assist Rogers with household expenses. However, defendant did not maintain any kind of steady employment.

In 2004, Rogers told defendant he needed to leave because she could not continue to support herself, her children, and defendant. However, defendant made no effort to find a new place to live. On 27 September 2004, at approximately 10:00 a.m., Rogers told defendant that he had to leave the home that day. Defendant became irritated and complained that he had no place to go. He took four tablets of Klonopin, a medicine he took for an anxiety disorder. The normal dose was one tablet, twice a day. The defendant felt groggy after taking the pills. He testified at trial that he did some laundry, played computer games, and checked his e-mail after taking the Klonopin.

Rogers left the home with her children, returned at approximately 6:00 p.m., and found defendant asleep on the couch. Rogers contacted the Sheriff's Department and told defendant to leave. Rogers told defendant that the police were on the way. Defendant became angry, grabbed his things, and left the residence. Between 2:00 a.m. and 2:30 a.m., defendant returned to the home. He used a key to gain entry to the home. Rogers was confronted by defendant, who was standing beside her bedroom door. Defendant attacked her with a large kitchen knife. Rogers eventually fell down, and defendant got on top of her and continued to stab her. Defendant did not say anything during the attack. Rogers was stabbed twenty-two times in the neck and chest.

Karissa Rogers was awakened by her mother's screams. She started striking defendant in an effort to make him stop stabbing her mother. Defendant turned on Karissa and began stabbing her. She was stabbed five times: once in the upper stomach resulting in liver

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damage, once in the chest causing damage to her diaphragm, and several times on her arm. Seth Rogers was also awakened by his mother's screams. He entered the living room and saw defendant stabbing Rogers and Karissa. Seth punched defendant and was able to stop him from attacking Karissa. Defendant fled the home. Defendant was found by a Sheriff's deputy riding a bicycle away from the residence. He was taken into custody and admitted to Lincoln County Sheriff's Department Detective Johnson that he had attacked Rogers but did not recall how many times he stabbed her or if he had stabbed anyone else.

At trial, defendant contended that he did not have the intent to kill Rogers or Karissa. Defendant presented Dr. John Warren as an expert witness in the fields of psychology and forensic psychology. Dr. Warren testified that defendant did not remember the actual attacks or what happened. Dr. Warren expressed the opinion that as a result of taking the four Klonopin tablets on the day of the attack, defendant's ability to form the specific intent to kill would have been "grossly impaired if there at all."

The jury found defendant guilty of: (1) assault with a deadly weapon with intent to kill inflicting serious injury upon Rogers; (2) assault with a deadly weapon with intent to kill inflicting serious injury upon Karissa; (3) assault with a deadly weapon upon Seth. Defendant was given consecutive active sentences totaling 176 months to 230 months. Defendant appeals.

Defendant's Ability to Form an Intent to Kill

[1] In his first two arguments defendant contends that the trial court erred in denying his motions to dismiss the two charges of assault with a deadly weapon with intent to kill inflicting serious injury because of insufficient evidence of his intent to kill. We disagree.

In *State v. Barnes*, 334 N.C. 67, 430 S.E.2d 914 (1993), our Supreme Court reiterated the standard of review for motions to dismiss in criminal trials:

Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.

Id. 334 N.C. at 75, 430 S.E.2d at 918 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)).

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Evidence is substantial if relevant and adequate to convince a reasonable mind to accept a conclusion. *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995) (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). If there is substantial evidence, whether direct or circumstantial, to support a finding that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be denied and the case should be submitted to the jury. See *State v. Williams*, 319 N.C. 73, 79, 352 S.E.2d 428, 432 (1987). In considering a motion to dismiss, the trial court must analyze the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from the evidence. *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995).

The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death. See N.C.G.S. § 14-32(a) (2003); *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004). On appeal, defendant contends that the State failed to present sufficient evidence and failed to prove beyond a reasonable doubt the third element—that defendant had the specific intent to kill the victims, Rogers and Karissa.

Defendant introduced the expert testimony of Dr. Warren who testified that in his opinion defendant could not have formed the specific intent to kill at the time of the attacks due to the presence of multiple mental disorders and defendant's excessive dose of Klonopin prior to the attacks. The State offered no expert testimony to rebut Dr. Warren's testimony. Defendant argues that Dr. Warren's testimony rebutted the element of intent to kill and that the State failed to present any contrary evidence.

An intent to kill is usually shown through inferences from the established underlying facts and circumstances of the case. *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972). "The nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred. Moreover, an assailant must be held to intend the natural consequences of his deliberate act." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (internal citations and quotation marks omitted). A qualified expert may give her opinion about whether a defendant could have formed an intent to kill. *State v. Jackson*, 340 N.C. 301, 310, 457 S.E.2d 862, 868 (1995). Expert testimony, however, does not bind a trier of fact. *Correll v.*

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Allen, 94 N.C. App. 464, 470, 380 S.E.2d 580, 584 (1989). “‘Even though unimpeached and uncontradicted,’ expert testimony is not conclusive upon the trier ‘since the trier may apply his own experience or knowledge in determining how far to follow the expressed opinion.’” *Id.* (quoting *Security-First Nat'l Bank of Los Angeles v. Lutz*, 322 F.2d 348, 355 (9th Cir. 1963)); *see also* N.C.P.I.—Crim 104.94 (2002).

While the State did not present expert testimony contradicting the testimony of Dr. Warren, the trial court properly considered the nature of the assaults on Rogers and Karissa in deciding whether the State presented sufficient evidence of intent. Evidence showed that defendant stabbed Rogers twenty-two times. In the course of stabbing her, defendant knocked her to the ground, got on top of her, and continued stabbing her. Defendant also stabbed Karissa five times inflicting serious injuries. The number of stab wounds and the manner in which the stabbing of Rogers and Karissa took place were all relevant factors for the jury to consider. *Grigsby*, 351 N.C. at 457, 526 S.E.2d at 462.

These facts, taken together with defendant’s own testimony and defendant’s statement to Detective Johnson that he had attacked Rogers, support the reasonable inference that defendant intended to kill Rogers and Karissa. Thus, the State satisfied its burden of offering sufficient evidence to support the element of intent to kill. *See Grigsby*, 351 N.C. 454, 526 S.E.2d 460 (holding that evidence of intent to kill existed when the defendant jumped on the victim’s back, threatened the victim, and used a knife that enabled the defendant to stab the victim without losing his grip). While Dr. Warren provided testimony that defendant did not form an intent to kill, it was for the jury to decide whether an intent to kill was present, and they were not bound by the opinion of defendant’s expert witness.

We further note that the trial court gave the jury instructions on a defendant’s voluntary intoxication by drugs. *See* N.C.P.I.—Crim. 305.19 (2002). If upon considering the evidence, the jury had a reasonable doubt as to whether defendant had the requisite intent, the jury was instructed to find defendant not guilty. The jury found defendant had the requisite intent to kill to support his conviction of assault. The trial court did not err in denying defendant’s motion to dismiss the two charges of assault with a deadly weapon with intent to kill inflicting serious injury. This argument is without merit.

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Impaneling the jury

[2] In his third argument, defendant contends that the trial court committed reversible error by failing to properly impanel the jury. We disagree, and hold that any error was not prejudicial.

Our standard of review for failure to properly impanel the jury is for prejudicial error. *State v. Stephens*, 51 N.C. App. 244, 246, 275 S.E.2d 564 (1981). N.C. Gen. Stat. § 15A-1216 provides that the clerk impanels the jury after all members of the jury have been selected. Defendant cites to *Stephens*, 51 N.C. App. at 246, 275 S.E.2d at 275, for its holding that prejudicial error exists where the trial court completely fails to impanel the jury.

Stephens is distinguishable from defendant's case. In *Stephens* the jury was never impaneled. In the instant case, the judge did not impanel the jury until after the State's opening statement to the jury. Although the trial court erred in failing to impanel the jury at the proper time in accordance with N.C. Gen. Stat. § 15A-1216, defendant presents no argument of prejudice arising from this error. There being no evidence of prejudice, we find the error to be harmless.

Trial Court's Handling of Jury Request to Review Evidence

[3] In his fourth and fifth arguments, defendant contends the trial court violated the mandatory requirements of N.C. Gen. Stat. § 15A-1233(a) when responding to the jury's request to review evidence during their deliberations and that he is entitled to a new trial. We disagree.

N.C. Gen. Stat. § 15A-1233(a) states:

If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

We review the trial court's decision in these matters for abuse of discretion. *Id*; see also *State v. Porter*, 340 N.C. 320, 329, 457 S.E.2d 716, 720 (1995).

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After the jury started its deliberations, the jury sent a note to the trial court asking to review certain evidence. The trial court, with the consent of both the State and defendant, sent two exhibits, one diagram and a photograph, to the jury room for review. The trial court did not conduct the jurors to the courtroom after this request. The jury also requested that they be able to view two statements defendant gave to Detective Johnson. The trial court correctly denied this request on the grounds that they had not been admitted into evidence. *See State v. Hines*, 131 N.C. App. 457, 462, 508 S.E.2d 310, 314 (1998). The trial court did not conduct the jurors into the courtroom following this request. The trial court instead wrote a note to the jurors, approved by both counsel, explaining the reason for denying the request. Defendant did not object.

We note that although defendant did not object at trial, “[a] lack of objection at trial does not bar a defendant’s right to assign error to a judge’s failure to comply with the mandates of Section 15A-1233(a).” *State v. Helms*, 93 N.C. App. 394, 401, 378 S.E.2d 237, 241 (1989) (citing *State v. Ashe*, 314 N.C. 28, 40, 331 S.E.2d 652, 659 (1985)). However, when a defendant’s lawyer consents to the trial court’s communication with the jury in a manner other than bringing the jury back into the courtroom, the defendant waives his right to assert a ground for appeal based on failure to bring the jury back into the courtroom. *Helms*, 93 N.C. App. at 401, 378 S.E.2d at 241. Defendant, therefore, waived the right to have the jury returned to the courtroom. This argument is without merit.

[4] Defendant also contends that the trial court failed to exercise its discretion when the jury requested they view defendant’s two statements to Detective Johnson during deliberations. Although defendant properly assigned error to this contention in the record, he fails to state any reasoning or argument or cite authority that there was any abuse of discretion on the part of the trial court. This assignment of error is therefore deemed abandoned. N.C. R. App. P. 28(b)(6) (2006).

For the foregoing reasons, defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judge GEER concurs.

Judge STEPHENS concurs prior to 31 December 2006.

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STATE OF NORTH CAROLINA v. GARLAND SCOTT BEAL

No. COA06-19

(Filed 2 January 2007)

1. Assault— deadly weapon inflicting serious injury— no duty to retreat from assault—instruction should have been given

The trial court should have given an instruction that defendant had no duty to retreat from the victim's assault on him, if his version of events is believed. The victim and defendant wound up in a "sword fight" with a pitch fork and machete after an argument broke out while they were drinking at the trailer where they lived and the victim asked defendant to leave. The evidence, viewed in the light most favorable to defendant, supports a conclusion that defendant was faced with a deadly assault and responded with deadly force.

2. Evidence— propensity for violence—context of ensuing fight—admissible

There was no error in a prosecution for assault with a deadly weapon inflicting serious injury in allowing the victim, who had known defendant since childhood, to testify that defendant became violent when drinking. The testimony was offered to provide a context for the fight which ensued after the victim asked defendant to leave rather than to prove that defendant acted in conformity with a violent disposition. N.C.G.S. § 8C-1, Rule 404(b).

Appeal by defendant from judgment entered 15 August 2005 by Judge W. Russell Duke, Jr. in Lee County Superior Court. Heard in the Court of Appeals 11 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General M. Elizabeth Guzman, for the State.

Adrian M. Lapas for defendant-appellant.

CALABRIA, Judge.

Garland Scott Beal ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury. We reverse and remand for a new trial.

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On 5 March 2004, defendant returned home to a mobile home he shared with the owner, Vernon McIver ("McIver"), a man he had known since childhood. Defendant rented a room from McIver for the previous two to four months at a cost of \$50 per week. Upon returning home, defendant found his brother, Jeffrey Beal, in the mobile home with McIver. The two men were drinking beer. Defendant joined them, and the three men continued drinking and talking. Eventually an argument erupted between McIver and defendant. McIver asked defendant to leave and defendant initially refused. Upon defendant's refusal, McIver walked across the street to his grandmother's home and called the police.

Defendant testified that he and his brother heard the call over a police scanner in the mobile home, and that after hearing the call he gathered his belongings and started to leave. Defendant testified that as he was coming out the front door, McIver returned and confronted him with a pitchfork. "[H]e juked at me and told me that I wasn't going anywhere now. That I was going to stay there and wait for the law," defendant testified.

Defendant testified that he retreated into the house and retrieved a machete McIver kept underneath the couch, then returned to confront McIver with it. "I went to the front door, and we proceeded to a sword fight with the [pitchfork and machete]," defendant stated. Defendant testified that the two fought until he knocked McIver off balance. Defendant stated that he then threw the machete from the step leading up to the trailer's front door. Defendant testified that he then started to leave but tripped over something in the yard. When he rolled over to retrieve his belongings, McIver was standing over him with the pitchfork and began stabbing him with it. "When he would jab, I would roll," defendant stated. Defendant testified that McIver swung the pitchfork and struck him, breaking off the pitchfork's handle. He claimed to have suffered minor injuries from the altercation. Defendant's brother provided testimony supporting defendant's version of events.

McIver testified to a different version of events. He testified that after defendant became argumentative, he told defendant to leave. When defendant refused, McIver walked across the street and used his grandmother's phone to call the police, then returned to the mobile home he shared with defendant. He testified that the police did not respond and defendant was becoming more argumentative, so he again walked across the street and called the police. "[W]henever I come back the second time, the door swung open and he jumped out

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with that machete," McIver stated. "[He] hit me in the top of the head, and knocked me to the ground. And there was a pitchfork lying there, and he was getting ready to come down on me again. And that's when I poked at him with the pitchfork, and he turned and run for the woods."

Defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The jury returned a verdict finding him guilty of the lesser offense of assault with a deadly weapon inflicting serious injury, a class E felony. Superior Court Judge W. Russell Duke, Jr., entered judgment upon the jury verdict and sentenced defendant to 37 months to 54 months in the North Carolina Department of Correction. From the judgment entered upon the jury's verdict, defendant appeals.

[1] Defendant on appeal brings forth two assignments of error. Defendant initially argues that the trial court erred in refusing his request to instruct the jury that defendant had no duty to retreat from an assault within the curtilage of his own home. We agree.

"Where the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are 'legally sufficient' to constitute a defense to the charged crime, the trial court must instruct the jury on the defense." *State v. Marshall*, 105 N.C. App. 518, 522, 414 S.E.2d 95, 97 (1992). So we review the evidence in the light most favorable to defendant and determine whether the evidence presented supported defendant's proposed instruction that he had no duty to retreat. This requires us to first define the law of self-defense by a person in his own home.

Ordinarily, when a person who is free from fault in bringing on a difficulty is attacked in his own home or on his own premises, the law imposes on him no duty to retreat before he can justify his fighting in self defense, regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm.

State v. Johnson, 261 N.C. 727, 729-30, 136 S.E.2d 84, 86 (1964). The home has been held to extend to curtilage, including the yard around the dwelling. *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

In the case *sub judice*, defendant was a lawful resident of the dwelling where the altercation occurred. Although McIver was the

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owner of the mobile home, defendant rented a room from McIver and was a lawful occupant of the premises. As such, defendant had no duty to retreat from an assault on the premises so long as he was not responsible for “bringing on the difficulty.” This is so even though McIver was also lawfully possessed of the premises and likewise had no duty to retreat from an assault. “[A] person is not obliged to retreat when he is assaulted while in his dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises.” *State v. Browning*, 28 N.C. App. 376, 379, 221 S.E.2d 375, 377 (1976).

Defendant argues that by confronting him and threatening him with a pitchfork, McIver assaulted defendant with a deadly weapon. As such, the defendant contends that he was entitled to retrieve a weapon of his own and defend himself and was under no duty to retreat from the assault. An assault is defined as “an overt act or attempt, with force or violence, to do some immediate physical injury to the person of another, which is sufficient to put a person of reasonable firmness in fear of immediate physical injury.” *State v. Porter*, 340 N.C. 320, 331, 457 S.E.2d 716, 721 (1995). Here, defendant testified that as he attempted to leave his house, McIver confronted him in the doorway and “juked” or jabbed a pitchfork at him in a threatening manner, demanding he return to the home. The implication from such an act was clear: defendant would be stabbed with the pitchfork unless he immediately submitted and retreated back inside. This is an assault.

McIver, in defendant’s version of events, was attempting to detain defendant until police arrived. Detention by a citizen of an individual suspected of criminal activity is allowed in limited situations, but no detention is allowed where the detaining citizen has no reason to believe a crime has been committed. Even where detention by a private citizen is allowed, the manner of the detention must be reasonable considering the offense involved and the circumstances of the detention. N.C. Gen. Stat. § 15A-404 (2005). “[A] private citizen should not be allowed to employ deadly force to detain a fleeing misdemeanant in circumstances under which an officer of the law could not have employed similar force to effect such an arrest.” *State v. Wall*, 304 N.C. 609, 616, 286 S.E.2d 68, 73 (1982). Assuming *arguendo* that defendant was a trespasser, it would be unreasonable for McIver to detain a non-violent misdemeanant at the point of a pitchfork.

Further, our Courts have held that “no man by the show of violence has the right to put another in fear and thereby force him to

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leave a place where he has a right to be.’ ” *State v. Price*, 271 N.C. 521, 526, 157 S.E.2d 127, 130 (1967) (quoting *State v. Martin*, 85 N.C. 508, 510 (1881)). Defendant argues that by extension, no man may forcefully prevent another man from leaving a place he has a right to leave. We agree with defendant’s argument in this respect.

Our appellate courts have never been called upon to determine whether a pitchfork constitutes a deadly weapon, but our Supreme Court, in an ancient case, once upheld a conviction for assault where one of the defendants followed the victim and intimidated him by carrying a pitchfork. *State v. Rawles*, 65 N.C. 334 (1871). A deadly weapon is “an instrument which is likely to produce death or great bodily harm under the circumstances of its use” *State v. Joyner*, 295 N.C. 55, 64, 243 S.E.2d 367, 373 (1978). We have held that whether an object is a deadly weapon depends on how it is used. *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970). Under this formulation, numerous objects have been held to be deadly weapons solely due to the manner in which they were used. A metal cane has been held to be a deadly weapon if used to strike a blow. *State v. Hensley*, 91 N.C. App. 282, 371 S.E.2d 498 (1988). Fire has been held to be a deadly weapon when used to burn an occupied dwelling. *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986). Fists have been held to be deadly weapons where the size of and condition of the parties merits such a holding. *State v. Grumbles*, 104 N.C. App. 766, 411 S.E.2d 407 (1991). Even a plastic bag has been held to be a deadly weapon when placed over a victim’s head. *State v. Strickland*, 290 N.C. 169, 225 S.E.2d 531 (1976).

In defendant’s version of events, McIver confronted him with the pitchfork and threatened him with it, forcing him back inside the mobile home. Defendant retreated into the home and retrieved a machete, then again attempted to leave the residence, which he had a right to do. Again he was confronted by McIver, who was blocking the door and holding the pitchfork so as to threaten defendant with injury if he attempted to exit the mobile home. In order to use a deadly weapon in self-defense, a defendant must be placed in reasonable fear of imminent death or serious bodily harm. *State v. Norman*, 324 N.C. 253, 378 S.E.2d 8 (1989).

Here, defendant, according to his testimony, was assaulted when initially confronted by McIver and was again assaulted when he returned and tried to exit a second time. That in the interval he withdrew and retrieved a weapon does not negate the show of deadly force by McIver on their first or second encounter. Nor does it make

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defendant responsible for “bringing on the difficulty,” since the evidence in the light most favorable to defendant shows that McIver was the first to resort to violence. At most, defendant was responsible for bringing on the argument, but not the armed struggle that ensued. Defendant had the right to exit his own residence and any attempt to hold him prisoner in the mobile home under the threat of being stabbed by a pitchfork amounted to a show of deadly force. It is for the jury to determine whether McIver posed an imminent threat of serious bodily injury to defendant, but under the facts in the light most favorable to defendant, defendant was under no duty to retreat if assaulted in his own home.

In the instant case, there was evidence tending to show that defendant was the initial aggressor and evidence showing that he reacted to an assault by McIver. “Such conflicts in evidence are for the jury to decide.” *State v. Hearn*, 89 N.C. App. 103, 106, 365 S.E.2d 206, 208 (1988). That there was evidence tending to disprove defendant’s version of events is immaterial, so long as the evidence, viewed in the light most favorable to defendant, supported defendant’s proposed instruction.

Here, the evidence, viewed in the light most favorable to defendant, supports a conclusion that defendant was faced with a deadly assault and responded with deadly force. As such, the jury should have been instructed that, if it believed defendant’s version of events, defendant had no duty to retreat from the assault by McIver. The trial court erred by refusing to grant defendant’s proposed instruction. Defendant is entitled to a new trial on this ground.

[2] Defendant next argues that the trial court erred by overruling his objection to testimony presented by the State in its case-in-chief that defendant becomes violent when drinking. We disagree.

Defendant argues that by overruling his objection and allowing character evidence to be introduced, the trial court violated N.C. Gen. Stat. § 8C-1, Rule 404 (2005). Rule 404 states, in relevant part, that “[e]vidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion” *Id.*

On direct examination, McIver testified, “[Defendant] gets violent when he gets to drinking.” Defense counsel immediately objected and moved to strike the remark. The trial court sustained the objection and ordered that the remark be stricken, stating, “Ladies and gentle-

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men, at this point you're not to consider that." The following exchange then took place:

Q. Just tell us what actually happened?

A. Well, anyway, we got to fussing so I asked him to leave. He wouldn't. So it got rough. So I walked over to my grandma's to call the police.

Q. Hang on. Let me stop you just a second. Why did you ask him to leave?

A. Because he gets—I tell you, I just said, when he's drinking, he gets violent.

Defense counsel once again objected and moved to strike the remark, but this time the trial court overruled the objection and motion to strike.

The State argues that the evidence was not offered to prove that defendant acted in conformity with his allegedly violent character, but was instead offered to explain McIver's state of mind in asking defendant to leave his home. That is, the evidence was admitted for the purpose of explaining the chain of events which led McIver to call the police, which in turn led to the altercation. Accordingly, the State contends that the evidence was properly admitted under N.C. Gen. Stat. § 8C-1, Rule 404(b)(2005), which states in relevant part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id. This section has been interpreted as allowing a *res gestae* exception to Rule 404(a)'s prohibition on character evidence. *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990). In *Agee*, our Supreme Court stated:

[A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct"

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exception. Such evidence is admissible if it “forms part of the history of the event or serves to enhance the natural development of the facts.” (internal citations omitted).

Agee, 326 N.C. at 547, 391 S.E.2d at 174.

Here, McIver testified that the altercation in question occurred after he asked defendant to leave their shared residence. When asked about the origin of their dispute, he stated that it began with an argument, and testified that he asked defendant to leave because he feared he would become violent, based on similar encounters in the past. This testimony was not offered for the purpose of proving that defendant acted in conformity with a violent disposition, but rather served to provide context for the ensuing fight. As such, its admission does not violate Rule 404’s prohibition on character evidence.

The judgment is reversed and the case is remanded for a new trial.

New trial.

Judge HUDSON concurs.

Judge HUNTER concurs in the result only.

The Judges participated and submitted this opinion for filing prior to 1 January 2007.

CHAD EVERETTE CALDWELL AND WIFE, CRYSTAL COPE CALDWELL, PLAINTIFFS V.
RANDY DEWITT BRANCH AND KRISTY N. CRAWFORD, DEFENDANTS

No. COA06-94

(Filed 2 January 2007)

1. Appeal and Error— standard of review not provided—printing costs assessed

Although defendant’s assignment of error could have been dismissed for failure to provide the standard of review with citation to authorities, the single violation was not substantial and defense counsel was instead charged with the printing costs of the appeal. N.C. R. App. P. 28(b)(6), 34(b).

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2. Easements— prescriptive—evidence sufficient

A judgment granting a prescriptive easement in a bench trial was affirmed where plaintiffs satisfied their burden of proof on the required elements. The parties were related by blood or marriage; the property involved a driveway created in 1958 that was used or maintained openly by plaintiffs or their predecessors since at least 1971.

Appeal by defendant from order entered 1 August 2005 by Judge W. Robert Bell in Gaston County Superior Court. Heard in the Court of Appeals 18 September 2006.

R. Locke Bell, for plaintiffs-appellees.

Malcolm B. McSpadden, for defendant-appellant Randy DeWitt Branch.

JACKSON, Judge.

On 1 August 2005, the Gaston County Superior Court found that Chad Everette Caldwell and Crystal Cope Caldwell (“plaintiffs”) had acquired an easement by prescription over property owned by Randy DeWitt Branch and Kristy N. Crawford. Branch (“defendant”) appealed to this Court, and we now affirm.

The instant dispute arose over a right-of-way across a parcel of land in Bessemer City, North Carolina, and all parties in the case are related by blood or marriage. The servient tract (“Tract C”) is a 0.42-acre parcel fronting Inman Avenue, and the dominant tract (“the Caldwell Property”) is located to the west of and adjacent to Tract C. A 0.27-acre lot (“Tract B”) sits directly to the north of and contiguous to Tract C. Another 0.27-acre lot (“Tract A”) sits directly to the north of and contiguous to Tract B. The lot directly to the south of Tract C (“the Branch Property”) is owned by defendant’s parents.

In 1958, plaintiff’s grandparents built a house on the Caldwell Property. At the time, defendant’s mother and father lived on the Branch Property; an Episcopal Church building sat on Tract A; and the Episcopal rectory was located on Tract B. During the construction of the Caldwell home, workers and vendors used Tract C for access to the Caldwell Property. By the time the house was completed, a *de facto* driveway spanning approximately 149 feet had been created that bisected Tract C and ran east to west from Inman Avenue to the Caldwell Property. The Caldwell and Branches, as well as

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their predecessors in interest, have referred at all times to the driveway as the “Caldwell driveway,” and a mailbox for the Caldwell Property was placed at the end of the driveway where it intersects with Inman Avenue.

From 1958 to 1990, the Episcopal Church used Tract C for parking. During this period of time, the Caldrews and any visitors to the Caldwell Property used the driveway to access the Caldwell Property. Also during this time, the Branches occasionally parked their cars on Tract C and used the driveway to access their property. Neither the Caldrews nor the Branches ever requested permission from the church to use the driveway. Additionally, although neither the Caldrews nor the Branches asked permission to maintain the driveway, both contributed to its maintenance. At various times over the thirty-two-year period, members of the Caldwell family scraped the driveway with a tractor, spread additional gravel on the driveway, and sufficiently preserved the driveway’s condition so that cars could traverse it. DeWitt Branch, defendant’s father, also scraped the driveway with a tractor and spread cinders from his mill when the driveway became muddy. At some point prior to 1990, plaintiff Chad Caldwell, without having asked or received permission from the church, paved a portion of the driveway with concrete to prevent rain runoff from causing the driveway to become rutted. Through such maintenance, the path of the driveway has remained the same over the years.

With the exception of a few months following his marriage in 1990, Chad Caldwell has lived in the Caldwell house since he was born on 7 August 1971. In 1994, Chad Caldwell purchased the house and property from his grandfather, and the Caldwell Property formally was conveyed to plaintiffs by deed recorded 4 December 2002.

In 1990, DeWitt Branch purchased Tracts A, B, and C from the Episcopal Church, which was in the process of relocating. Without asking permission from the Branches, plaintiffs and visitors to the Caldwell Property continued to use the driveway for ingress and egress, and the Branches, aware of such use, did not object.

In 1996, DeWitt Branch told defendant that he would give defendant Tract C, and in 2002, the property was deeded to defendant. Chad Caldwell then asked defendant if he could continue to use the driveway to access his property. Defendant, who was planning to build a house on Tract C, refused to allow plaintiffs continued access over the right-of-way in dispute, but stated that he would find another

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point of access for plaintiffs.¹ Nevertheless, plaintiffs and visitors to the Caldwell Property continued to use the driveway until defendant blocked the driveway in January 2003. Consequently, on 17 January 2003, plaintiffs filed suit claiming they had acquired an easement across Tract C and that defendant was interfering with the use of that easement. The trial court found in favor of plaintiffs, and defendant appeals from that ruling.

[1] As a preliminary matter, we note that defendant's brief fails to comport fully with the North Carolina Rules of Appellate Procedure. Rule 28(b)(6) provides that “[t]he argument shall contain a concise statement of the applicable standard(s) of review for each question presented, which shall appear either at the beginning of the discussion of each question presented or under a separate heading placed before the beginning of the discussion of all the questions presented.” N.C. R. App. P. 28(b)(6) (2006). Rule 28(b)(6) further requires that “the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.” *Id.* In the case *sub judice*, defendant has not provided this Court with the applicable standard of review, much less citation of authorities supporting such a standard, for his contention that the trial court erred in finding a prescriptive easement in favor of plaintiffs.

“The North Carolina Rules of Appellate Procedure are mandatory,” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam), *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005), and Rule 25(b) of the Rules of Appellate Procedure provides this Court with the authority to impose sanctions for failure to follow the rules. *See* N.C. R. App. P. 25(b) (2006). It appears to be the trend of this Court to more severely penalize parties for “substantial,” “numerous,” or “multiple” violations of our appellate rules, rather than a single violation such as is present in the instant case. *See Stann v. Levine*, 180 N.C. App. 1, 5, 636 S.E.2d 214, 217 (2006) (“When viewed *in toto*, the nature and number of rules violations, combined with the absence of any compelling justification for suspending the rules pursuant to Rule 2, justifies dismissal of plaintiff’s appeal.”). Although we could dismiss defendant’s assignment of error as a sanction, *see, e.g., State v. Summers*, 177 N.C. App. 691, 700, 629 S.E.2d 902, 908, *disc. rev. denied and appeal dismissed*, 360 N.C. 653, 637 S.E.2d 192 (2006), we instead choose to order defendant’s counsel

1. Although the trial court states that this encounter occurred in 1966, this appears to be a clerical error, as the findings of fact proceed chronologically and Chad Caldwell was not born until 1971. The date instead should read 1996.

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to pay the printing costs of this appeal pursuant to Rule 34(b), as defendant's single violation is not substantial. *Cf. Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 702 n.2, 635 S.E.2d 442, 446 (2006) (reviewing the appeal even though the petitioner "ha[d] not complied with N.C. R. App. P. 28(b)(6), which requires not only that '[t]he argument . . . contain a concise statement of the applicable standard(s) of review,' but also that the statement of the standards of review 'contain citations of the authorities upon which the appellant relies.'"). We instruct the Clerk of this Court to enter an order accordingly.

[2] "The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.'" *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

It is well-settled that to establish the existence of a prescriptive easement, the party claiming the easement must prove four elements concerning the property:

- (1) that the use is adverse, hostile or under a claim of right;
- (2) that the use has been open and notorious such that the true owner had notice of the claim;
- (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and
- (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Potts v. Burnette, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981); *see also West v. Slick*, 313 N.C. 33, 49-50, 326 S.E.2d 601, 610-11 (1985). Mere failure of the owner of the servient tenement to object—even if he was aware of the use—is insufficient, as the party seeking to claim the easement must overcome the presumption that a party's use is permissive and not adverse. *See Henry v. Farlow*, 238 N.C. 542, 543-44, 78 S.E.2d 244, 245 (1953); *see also Cannon v. Day*, 165 N.C. App. 302, 307, 598 S.E.2d 207, 211, *disc. rev. denied*, 359 N.C. 67, 604 S.E.2d 309 (2004). Indeed, "[t]here must . . . be some evidence accompanying the user, giving it a hostile character and repelling the inference that it is permissive and with the owner's consent, to create the easement by prescription and impose the burden upon the land." *Farlow*, 238 N.C. at 544, 78 S.E.2d at 245 (quoting *Darr v.*

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Carolina Aluminum Co., 215 N.C. 768, 772, 3 S.E.2d 434, 437 (1939)). However, our Supreme Court has clarified the hostility requirement by explaining that

it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A “hostile” use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

Dulin v. Faires, 266 N.C. 257, 260-61, 145 S.E.2d 873, 875 (1966) (internal citation and quotation marks omitted). This Court has noted that “adverse use implies use that is exclusive as against the community or public at large.” *Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 139, 304 S.E.2d 259, 261 (1983).

In the case *sub judice*, plaintiffs satisfied their burden of proving each of the elements required for a prescriptive easement. The alleged easement first was established in 1958 as a means for ingress and egress to the Caldwell Property when the house was being built. Cheryl Lindsay testified that she was eight years old when the house was built, that she lived in the house until 1969 when she was nineteen years old, and that she continued to visit long after moving out. During all of this time, however, the driveway at issue was the only way to access the house that she has ever known or used. Ms. Lindsay testified that during the time she lived in the house, she was unaware as to who owned Tract C but was aware that her family maintained the road. She further testified that visitors to the Caldwell house, as well as the Branches, used the driveway. Finally, although Tract C and the driveway that ran across it were owned by the Episcopal Church, she never saw members of the church use the driveway.

Plaintiff Chad Caldwell testified that he had lived in the house since 1971 and that, while he could not say for sure who used the driveway before he was born, the driveway at issue was the road used to access the Caldwell Property. Chad Caldwell further testified that the Caldwells’ mailbox at the end of the driveway had been there as long as he had been alive. Chad Caldwell recalled that his grandfather, Ken Caldwell, had maintained the driveway by using his tractor to scrape and gravel it from Inman Avenue all the way to the house. Chad Caldwell also explained how he carried on his grandfather’s work in maintaining the road by scraping and graveling it. Chad Caldwell further testified that, without providing notice or seeking permission, he

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paved a portion of the driveway to decrease water damage to the road. Finally, Chad Caldwell testified that prior to filing the lawsuit, he never had any conversations or negotiations regarding purchasing the right-of-way.

DeWitt Branch, defendant's father, testified that while he was aware that plaintiffs used and maintained the road, he did not care about such use. DeWitt Branch further stated that "everybody"—*i.e.*, members of the church and Ken Caldwell—used the driveway, but only the plaintiffs and their predecessors in interest used the whole length of the driveway.

Based on the record in the present dispute, we hold the trial court was justified in finding a prescriptive easement in favor of plaintiffs. Plaintiffs and their predecessors in interest never asked permission to use and maintain the land, and although permissive use is presumed, the use was obvious and spanned a long period of time. The Caldwells and visitors to the Caldwell Property traversed the driveway on a daily basis, and plaintiffs and their predecessors maintained the road by scraping, graveling, and paving a portion of the road. Plaintiffs and their predecessors treated the driveway as their own, and a mailbox for the Caldwell Property stood at the end of the driveway abutting a public road for over thirty years. Additionally, the Episcopal Church, whose members frequently parked on Tract C, must have been aware of the use by and the intentions of the plaintiffs and their predecessors in interest. As such, plaintiffs' use of the driveway was both open and notorious as well as hostile and adverse. The record is clear that the direction, size, and location of the driveway has remained fixed and constant since 1958, and thus, there has been substantial identity of the claimed easement. Finally, the use has been for more than twenty years. Plaintiffs can trace the hostile and open use of the driveway back at least to 1971. As such, this Court need not address whether the adverse period began running from 1958. The span of time from 1971, when Chad Caldwell was born, to 2003, when defendant blocked the driveway and plaintiffs filed suit, is sufficient to meet the twenty-year requirement for a prescriptive easement.

Although defendant contends that the trial court's findings are not supported and that the findings, in turn, do not support the court's conclusions of law, in the instance of a bench trial, "the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams*

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v. Pilot Life Ins. Co., 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975). Furthermore, “[a]s fact finder, the trial court is the judge of the credibility of the witnesses who testify,” and thus, in evaluating any inconsistencies and contradictions between and among witnesses, “[t]he trial court determines what weight shall be given to the testimony and the reasonable inferences to be drawn therefrom.” *Cornelius v. Helms*, 120 N.C. App. 172, 175, 461 S.E.2d 338, 340 (1995), *disc. rev. denied*, 342 N.C. 653, 467 S.E.2d 709 (1996).

Accordingly, as this Court stated in *Cannon v. Day*,

[w]here, as here, the evidence shows that permission to use the lane had been neither given nor sought, that the plaintiffs performed maintenance required to keep the road passable, and that the plaintiffs used the road for over 20 years as if they had a right to it, the evidence is sufficient to rebut the presumption of permissive use and establish that the use was hostile and under a claim of right.

Cannon, 165 N.C. App. at 308, 598 S.E.2d at 212.

AFFIRMED.

Chief Judge MARTIN and Judge ELMORE concur.

BENJAMIN L. LEWIS, PLAINTIFF v. GINA J. LEWIS N/K/A EVERHART, DEFENDANT

No. COA06-599

(Filed 2 January 2007)

Child Support, Custody, and Visitation—order changed—prior conclusion that circumstances had not changed

The trial court erred by changing a prior child support and custody order after concluding that there had not been a showing of a substantial change of circumstances.

Appeal by defendant from orders entered 28 December 2005 by Judge William A. Creech in Craven County District Court. Heard in the Court of Appeals 16 November 2006.

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*Benjamin L. Lewis, pro se.**Charles William Kafer, for defendant-appellant.*

LEVINSON, Judge.

Defendant (hereinafter mother) appeals from the trial court's order on child support and custody. We reverse and remand.

The pertinent facts may be summarized as follows: Plaintiff (hereinafter father) of Craven County, North Carolina and mother, previously of Craven County, were married on 1 January 1994. Two children were born of the marriage, Nathan Cole Lewis, born 22 July 1993, and Elijah Michael Lewis, born 18 March 1996. The parties separated on 10 May 1997 and were subsequently divorced pursuant to an order entered on 17 August 1998. On 26 June 1998, the parties executed a separation agreement which was incorporated in a divorce judgment filed on 17 August 1998. The agreement provided for the parties to have joint custody of the children. The children would reside primarily with mother, and spend every other weekend and summer vacation with father. The agreement further provided that father would pay half of the children's uninsured medical and dental expenses, and \$200.00 each month as additional child support to mother.

In July 2001, father married and has another child born of that marriage. Father has been employed by the New Bern Police Department since December 1998. In April 1999 mother married Charles Everhart, a master gunnery sergeant in the United States Marine Corps, and subsequently moved to Yuma, Arizona. Mother and Everhart have two children together. Mother is not employed outside of the home. On 14 August 2000, father filed a motion in the cause seeking a modification of the judgment of 11 August 1998. Father asserted a substantial change or circumstances on the grounds that mother moved to Arizona, and requested changes to his visitation schedule.

A 5 October 2000 consent order concluded a substantial change in circumstances affecting the welfare of the children occurred, and modified the custody and visitation provisions of the 1998 judgment. This consent order continued primary custody of the children with mother, and awarded father secondary custody with the children from the first Monday following the last day of school until the Monday two weeks before the beginning of the next academic school year. Father was also afforded visitation during the children's spring

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and fall breaks from school, and the Thanksgiving and Christmas holidays. The consent order also terminated father's obligation to pay \$200.00 each month in child support to mother.

On 2 August 2004, mother filed a motion in the cause seeking an order modifying the consent order of 5 October 2000. In her motion, mother asserted that she frequently visits family members in New Bern, North Carolina; that father denied her access to the children when she visited her family in 2004; and that father had visited the children on only eight of the nineteen periods provided for him in the 5 October 2005 order. In addition, mother asserted that father "has not provided adequate support under the facts and circumstances of this case as within the contemplation of North Carolina General Statutes 50-13.4 and 50-13.6." Mother sought, *inter alia*, child support calculated pursuant to the North Carolina Child Support Guidelines; a visitation schedule for father that reflected father's actual history of visitation with the children; and allowance for mother to visit with the children on a limited basis when she visited her family in North Carolina.

In a detailed order filed 28 December 2005, the trial court made many findings concerning, *inter alia*, the history of the case; employment; income; expenses; changes in marital status; and details concerning the children's time with mother and father. The trial court concluded, in pertinent part:

4. That the parties are essentially in relatively the same position as they were at the time of the entry of the Consent Order in October 5, 2000. The needs and welfare of the minor children are basically the same as of October 5, 2000, and they are being met by the parties as provided in the Consent Order of October 5, 2000. The [father], in order to exercise his custody and visitation with the minor children, over a long distance, is required to expend his income for travel and other related expenses as well as provide for the total needs of the children while the minor children are in his custody for the summer.
5. The [mother] has not produced substantial competent evidence showing any substantial and material change in the needs of the parties' minor children justifying any change in the terms of the parties agreement and the Consent Order of October 5, 2000, except as otherwise provided hereinbelow. Therefore, consideration of the parties' respective assets and income between 2000 and 2005 is not necessary.

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6. That after consideration of the evidence, the [mother] has not shown that there has been a substantial and material change in the needs of the minor children of the parties warranting a modification of the existing Consent Order of October 5, 2000, except as follows, to wit:

'In addition to defraying the transportation expenses incurred in connection with exercising visitation with his sons, the [father] shall pay child support in the amount of fifty dollars (\$50.00) monthly for each minor son for a total of one-hundred dollars (\$100.00) monthly and defray all their living expenses during the summer months when they are in the custody of the [father]; said child support to be paid to the [mother] directly while the minor children reside with the [mother] and until each child: 1) attains the age of eighteen (18) years of age, but if the minor has not finished high school as yet, then until completion of the high school year when he reaches eighteen; 2) dies; or 3) becomes emancipated.'

7. That after consideration of the evidence, there has been no showing by the [mother] that there has been a substantial and material change in the circumstances of the parties warranting a modification of the existing Consent Order of October 5, 2000 as it pertains to limiting the [father's] right to visitation during the Fall and Spring school breaks and the Thanksgiving visitation provisions of the Consent Order, except as to summer visitation, as follows:

"the [father] shall arrange for the minor children to stay at the residence of the [mother's] parents one (1) weekend while the minor children are in [father's] physical custody during the summer. The weekend visitation with the [mother] shall be the fourth (4th) weekend after the children have been in the physical custody of the [father] for the summer. This provision allows the [mother] visitation with the minor children during the summer while at the maternal grandparent's residence in Craven County, North Carolina; said weekend visitation will begin at 6:00 p.m. on Friday and end at 6:00 p.m. on the following Sunday."

. . . .

9. The Consent Order of October 5, 2000 was an integrated agreement fashioned by the parties to accomplish goals presented by the [mother's] voluntary move to Yuma, Arizona with the parties'

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two (2) minor children, and the Court finds that the parties have been able to work reasonably well together in the past under the terms of the Consent Order. That the needs and the welfare of the minor children were well provided for by the Consent Order.

Consistent with these conclusions, the trial court ordered father to pay \$100 monthly in child support, and modified custody as set forth in paragraph 7 above. In addition, the trial court ordered each party to bear its own attorney fees and costs. From this order, mother appeals.

Mother first contends it was error for the court to modify the existing consent order as to custody when it concluded, at the same time, that there had not been any substantial change in circumstances. We agree.

Pursuant to N.C. Gen. Stat. § 50-13.7(a) (2005), “an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.” “The word custody under the statute also includes visitation.” *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 906 (1991) (citing *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978)). This Court has stated:

Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child. A party seeking modification of a child custody order bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child.

Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (internal citations omitted). In addition, “a substantial change in circumstances affecting the welfare of a child must be supported by findings of fact based on competent evidence.” *White v. White*, 90 N.C. App. 553, 557, 369 S.E.2d 92, 95 (1988).

Here, the trial court concluded that “there has been no showing by the [mother] that there has been a substantial and material change in the circumstances of the parties warranting a modification of the existing Consent Order of October 5, 2000 as it pertains to limiting the [father’s] right to visitation during the Fall and Spring school breaks

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and the Thanksgiving visitation provisions of the Consent Order, except as to summer visitation . . ." (Emphasis added). Thus, the order was modified with respect to custody by providing a weekend visitation with mother one weekend during the summer months. Either a substantial change of circumstances occurred or not. The trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order. Mother next contends the trial court erred by modifying the existing child support order by requiring father to pay \$100.00 monthly. She contends the trial court (1) failed to consider the North Carolina Child Support Guidelines in evaluating whether a substantial change of circumstances occurred, and (2) improperly modified the existing child support order after concluding there had not been a substantial change of circumstances. We agree.

G.S. § 50-13.7(a) provides that "[a]n order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party. . ." Under the heading "Modification," the Commentary to the North Carolina Child Support Guidelines provides:

In a proceeding to modify an existing order that is three years old or older, a difference of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines based on the parents' current incomes and circumstances shall be presumed to constitute a substantial change of circumstances warranting modification. If the order is less than three years old, this presumption does not apply.

N.C. Child Support Guidelines, 2006 Ann. R. N.C. at 51.

As the trial court's findings of fact reflect, an examination of whether the children's needs have changed is relevant to a determination of whether a parent has made a showing of changed circumstances pursuant to G.S. § 50-13.7(a). *See, e.g., Armstrong v. Droessler*, 177 N.C. App. 673, 674-75, 630 S.E.2d 19, 21-22 (2006). Where the existing order was entered three or more years earlier, the trial court must also consider, consistent with the N.C. Child Support Guidelines, whether a fifteen percent (15%) increase in father's obligation would occur based upon an application of the child support guidelines. *See, e.g., Willard v. Willard*, 130 N.C. App. 144, 146-48, 502 S.E.2d 395, 397-98 (1998); *Garrison ex rel. Williams v. Connor*, 122

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N.C. App. 702, 704-06, 471 S.E.2d 644, 645-47 (1996). This mechanism to make a presumptive showing of a change of circumstances (by showing that the application of the Guidelines would result in a change in the child support obligation of fifteen percent or more) was first added to the N.C. Child Support Guidelines in 1994. *See* N.C. Child Support Guidelines, 1999 Ann. R. N.C. at 34. Neither the language of the fifteen percent provision in the Child Support Guidelines, nor this Court's application of the same, suggests that the existing child support order must have been based on the Child Support Guidelines before the provision can be employed. *See Willard*, 130 N.C. App. at 146-48, 502 S.E.2d at 397-98. We conclude, contrary to the trial court's observation in paragraph 5 above, that the parties' incomes must be considered in this matter to properly evaluate mother's motion to modify child support.

Moreover, like the trial court's error concerning custody, the trial court erroneously changed the existing child support order after concluding that there had not been a showing of a substantial change of circumstances. The trial court concluded that "[mother] has not shown that there has been a substantial and material change in the needs of the minor children of the parties warranting a modification of the existing Consent Order of October 5, 2000 except as [to paying \$100.00 monthly]." (Emphasis added). Again, either a substantial change of circumstances occurred or not. The court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order.

On remand, it is within the trial court's discretion whether to receive additional evidence. Moreover, without suggesting how the trial court should rule, we instruct the trial court to reconsider mother's motion for attorney's fees in light of our decision to remand for further proceedings.

Reversed and remanded.

Judges GEER and JACKSON concur.

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DAVID JONES, T/A ROYAL CLEANERS AND LAUNDRY, PLAINTIFF V. TOWN OF ANGIER; AND ANGIER & BLACK RIVER FIRE DEPARTMENT, INC., DEFENDANTS

No. COA06-391

(Filed 2 January 2007)

1. Statutes of Limitation and Repose— provision of dirty water to dry cleaner—continuing injury

The statute of limitations had run and the trial court did not err by granting defendants' motions for summary judgment on a negligence claim that involved the flushing of water pipes and the provision of water with sediments which stained clothes at plaintiff's dry cleaning business. The injury was a continuing one that was apparent to plaintiff for more than three years.

2. Warranties; Statute of Limitations— municipal water supply—dirty water furnished to dry cleaner

The trial court erred by granting summary judgment for defendant town on a claim for breach of implied warranty of merchantability arising from the provision of water which damaged the clothes at plaintiff's dry cleaning business. The claim is not completely barred because plaintiff could not determine whether the water was fit for use prior to purchase. However, the two-year statute of limitations for contract claims against local governments limits plaintiff to seeking damages for the two years preceding the lawsuit. N.C.G.S. § 1-53.

Appeal by plaintiff from judgments entered 20 September 2005 and 21 October 2005 by Judge D. Jack Hooks, Jr., in Harnett County Superior Court. Heard in the Court of Appeals 6 December 2006.

Bain, Buzzard & McRae, LLP, by Edgar R. Bain and L. Stacy Weaver III, for plaintiff appellants.

Little & Little, PLLC, by Cathryn M. Little, for Town of Angier defendant appellee.

Cranfill, Sumner & Hartzog, LLP, by Robert W. Sumner and Meredith T. Black, for Angier and Black River Fire Department, Inc., defendant appellee.

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McCULLOUGH, Judge.

Plaintiff appeals from judgments granting defendants' motions for summary judgment. We affirm in part and reverse and remand in part.

FACTS

Plaintiff David Jones ("plaintiff") operates a business under the name of Royal Cleaners and Laundry. Royal Cleaners and Laundry is located in the Town of Angier, North Carolina ("Angier"), a named defendant. Defendant Black River Fire Department, Inc. ("Fire Department") is a non-profit corporation existing pursuant to the laws of North Carolina that provides fire protection and emergency medical services to the citizens and residents of Angier and the Black River Township.

On 25 April 2005, plaintiff filed an amended complaint against Angier and Fire Department asserting negligence against both defendants and breach of the implied warranty of merchantability against Angier. The basis of the claims against Angier are that plaintiff was provided water by Angier that was often filled with mud, dirt, rust, or other impediments which left brown spots or discoloration on clothing or garments which had been brought to plaintiff's place of business by its customers for washing or cleaning. The basis of the claim against Fire Department is that in flushing the fire hydrants, Fire Department stirred up mud, clay, and other sediments in the line which were transported through the water lines to plaintiff's business which eventually stained customers clothes and damaged plaintiff's business. Plaintiff claims that he has on numerous occasions attempted to get Angier and Fire Department to desist from continuing to provide unclean water and stirring up water in the lines, but that both defendants have done nothing to assist in solving plaintiff's problem. On 22 July 2005, Fire Department and Angier filed motions for summary judgment. Then on 20 September 2005 and 21 October 2005, the trial court granted Fire Department and Angier's motions for summary judgment, respectively.

Plaintiff appeals.

I.

Plaintiff contends that the trial court erred in granting defendants' motions for summary judgment. We disagree regarding plaintiff's negligence claims, but we agree regarding plaintiff's breach of the implied warranty of merchantability claim.

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Granting summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). “There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006). On appeal from a grant of summary judgment, this Court reviews the trial court’s decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 573-74 (1999).

Here, plaintiff asserted two causes of action based on negligence, one against Fire Department and one against Angier, and one cause of action based on the implied warranty of merchantability against Angier.

A. Negligence

[1] Plaintiff contends that the instant case is similar to the case of *Harrison*, and that his negligence claims are not barred by the statute of limitations. In *Harrison*, the plaintiffs owned a residence which was serviced by a sewer line and manhole maintained and operated by the City of Sanford. *Harrison*, 177 N.C. App. at 117, 627 S.E.2d at 674. Beginning in 1992, the Harrisons had problems with sewage from the sewer line and manhole entering their yard and a small concrete area of the basement. *Id.* Beginning in 1996, the Harrisons contacted the City of Sanford on several occasions regarding the problems with the sewage discharge, but the City failed to correct the problems. *Id.* Then on 8 August 2003, a large rain storm occurred which caused 39 inches of sewage to enter the Harrisons’ basement causing personal property damage of approximately \$49,000 and other property damage totaling approximately \$20,000. *Id.* The Harrisons filed a lawsuit against the City of Sanford alleging, among other things, negligence. *Id.* The City of Sanford filed a motion for summary judgment. *Id.* The trial court entered an order granting the City of Sanford’s motion for summary judgment, and the Harrisons appealed. *Id.* We determined that the trial court erred in granting summary judgment and noted that the lawsuit was not barred by the three-year statute of limitations found in N.C. Gen. Stat. § 1-52(16) (2005), because of the “separate and distinct nature” of the different property damage events

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complained of by the Harrisons. *Id.* at 119, 627 S.E.2d at 675. We noted there was a difference between the damage that occurred before 8 August 2003 consisting of broken pipes and concrete, and the damage which occurred on 8 August 2003 which caused a loss of approximately \$69,000. *Id.* We stated that *Harrison* was not a case of a continuing injury nor was it one involving an exacerbated injury. *Id.* at 119, 627 S.E.2d at 676.

Defendant asserts that the instant case is not like *Harrison*, but is like *Robertson v. City of High Point*, 129 N.C. App. 88, 497 S.E.2d 300, *disc. review denied*, 348 N.C. 500, 510 S.E.2d 654 (1998). In *Robertson*, the plaintiffs filed a suit alleging, among other things, negligence based on damage caused by the operation of a landfill in the dumping of solid waste. *Id.* at 90, 497 S.E.2d at 301-02. The plaintiffs alleged that the City's landfill operation caused damage to their property beginning 9 October 1993, but their complaint was not filed until 23 December 1996. *Id.* at 91, 497 S.E.2d at 302. We held that the claims were barred by the statute of limitations. *Id.* In so holding, we stated, "where plaintiffs clearly know more than three years prior to bringing suit about damages, yet take no legal action until the statute of limitations has run, the fact that further damage is caused does not bring about a new cause of action." *Id.*

After reviewing the record and depositions, we determine the instant case to be like *Robertson*. Here, the injury was a continuing injury which was apparent to plaintiff for more than three years. Plaintiff admits in his amended complaint that the dirty water had been periodically furnished to him over a period of more than ten years. In addition, the amended complaint states that plaintiff experienced problems with the dirty water at least two or three times per month in each year during the last ten years. Further, we do not think the injuries complained of by plaintiff had a "separate and distinct nature" like the injury complained of in *Harrison*. Accordingly, we disagree with plaintiff's contention.

B. Implied Warranty of Merchantability

[2] We have previously stated that the sale of water by a municipality is a proprietary function not subject to governmental immunity and constitutes the sale of goods under the Uniform Commercial Code ("U.C.C."). *Mulberry-Fairplains Water Assn. v. Town of North Wilkesboro*, 105 N.C. App. 258, 264-65, 412 S.E.2d 910, 914-15, *disc. review denied*, 332 N.C. 148, 419 S.E.2d 573 (1992). Under the U.C.C., a warranty of merchantability is implied in the sale of goods if the

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seller is a merchant with respect to goods of that kind. N.C. Gen. Stat. § 25-2-314(1) (2005). The U.C.C. contains a four-year statute of limitations for breach of warranty, accruing from when tender of delivery is made. N.C. Gen. Stat. § 25-2-725 (2005).

Here, Angier tenders water to plaintiff every time he uses water at his business. Thus, under the particular facts of this case, the statute of limitations found in the U.C.C. would not bar plaintiff from suing for any damages that have occurred within the four years prior to the filing of the lawsuit. However, the North Carolina General Statutes contain a two-year statute of limitations for actions brought against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. N.C. Gen. Stat. § 1-53 (2005). Because Angier is a local unit of government, plaintiff can only sue for any damages that have occurred within two years prior to filing the lawsuit based on the implied warranty of merchantability.

Angier relies on *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967), contending that plaintiff's claim for breach of the implied warranty of merchantability should be barred. In *Matthieu*, our Supreme Court stated that the “ “[i]mplied warranty cannot extend to defects which are visible and alike within the knowledge of the vendee and vendor, or when the sources of information are alike open and accessible to each party.” ” *Id.* at 217, 152 S.E.2d at 341 (quoting *Driver v. Snow*, 245 N.C. 223, 225, 95 S.E.2d 519, 520-21 (1956)). “ There is no implied warranty where the buyer has knowledge equal to that of the seller . . . the presence of the goods at the time of sale open and available for inspection . . . prevents the implication of warranties.” *Driver*, 245 N.C. at 225, 95 S.E.2d at 521 (citation omitted).

Here, the water supplied to plaintiff by Angier cannot be inspected at the time of the sale. As soon as any water is used, plaintiff has purchased it. Thus, there does not seem to be any practical way for plaintiff to inspect the water prior to purchase. Also, the water was not dirty every time plaintiff used it. Thus, without being able to inspect it prior to purchase, plaintiff could not determine whether the water was fit for use. Accordingly, we determine that plaintiff's claim based on the implied warranty of merchantability is not barred, but plaintiff can only seek damages for the period of two years preceding the filing of the lawsuit.

Therefore, we affirm the trial court regarding plaintiff's claims against Angier and Fire Department based on negligence. However,

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we reverse and remand to the trial court regarding plaintiff's claim based on the implied warranty of merchantability against Angier.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.



IN THE MATTER OF: D.J.M., JUVENILE

No. COA06-397

(Filed 2 January 2007)

**Juveniles— court supervision—admission of violations—
inquiry by trial court**

The trial court did not err by not making the specific inquiries enumerated in N.C.G.S. § 7B-2407 when reviewing a juvenile's admissions of violations of court supervision. N.C.G.S. § 7B-2407 is the juvenile corollary of the statute advising adults of the consequences of a guilty plea, and does not apply to admissions by a juvenile of violations of the conditions of court supervision. Those violations are addressed by an entirely different statute, in an entirely different Article of the Juvenile Code, with significantly different safeguards from allegations of a criminal offense.

Appeal by juvenile from orders entered 29 November 2005 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 7 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Brent D. Kiziah, for the State.

Charlotte Gail Blake, for juvenile-appellant.

LEVINSON, Judge.

D.J.M. (juvenile) appeals from the trial court's order revoking his court supervision.¹ We affirm.

1. "Court supervision" and "probation" are used interchangeably in this opinion, as are "motion for review" and "probation violation."

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The pertinent facts may be summarized as follows: On 17 August 2004, the trial court adjudicated D.J.M. delinquent for larceny of a motor vehicle and for assault inflicting serious injury. In a disposition order entered 7 December 2004, the trial court placed the juvenile under court supervision for six months. On 15 November 2005, the State filed a motion for review, alleging that D.J.M. violated two conditions of his probation on or about 14 November 2005 when he “became aggressive toward another peer at placement [and] as [a] result he was discharged from placement.” At the conclusion of a 29 November 2005 hearing related to placing D.J.M. in a facility that best suited his needs, the trial court stated, “[D.J.M.] was on probation, that he’s violated his probation, that there are no other placements available other than commitment to the Youth Development Center. And I will order that he be placed there for a period of time not to exceed his 18th birthday.”

Using a form order generally reserved for adjudications that juveniles have committed a substantive criminal offenses (AOC-J-460, New 7/99), the trial court found that J.D.M. “admitted the allegation(s) contained in the petition in accordance with the procedures required by G.S. 7B-2407.” The trial court further found that “[t]he juvenile through his attorney admits to the allegations of probation violation as alleged in the motion filed 11-15-2005. The Court accepts the admission and finds the juvenile to be delinquent by reason of probation violation.” In a “Juvenile Level 3 Disposition and Commitment Order (Delinquent)” the trial court committed the juvenile to a training school for an indefinite period not to exceed his eighteenth birthday. Furthermore, in its disposition order, the trial court indicated that it “received and considered a predisposition report . . . and incorporate[d] the contents of that report by reference.” D.J.M. appeals.

D.J.M. contends that the trial court erred by finding that he had admitted the allegations contained in the motion for review in accordance with N.C. Gen. Stat. § 7B-2407 (2005).² D.J.M. argues that the order must be vacated because the trial court failed to make the specific inquiries enumerated in G.S. § 7B-2407 to ensure that his admission of violating the terms of court supervision was knowing and voluntary.

2. Respondent argues only that the trial court erred by not following the statutory requirements set forth in Section 7B-2407. He does not make any constitutional arguments.

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G.S. § 7B-2407(a), entitled “When admissions by juvenile may be accepted”, provides:

- (a) The court may accept an admission from a juvenile only after first addressing the juvenile personally and:
 - (1) Informing the juvenile that the juvenile has a right to remain silent and that any statement the juvenile makes may be used against the juvenile;
 - (2) Determining that the juvenile understands the nature of the charge;
 - (3) Informing the juvenile that the juvenile has a right to deny the allegations;
 - (4) Informing the juvenile that by the juvenile’s admissions the juvenile waives the juvenile’s right to be confronted by the witnesses against the juvenile;
 - (5) Determining that the juvenile is satisfied with the juvenile’s representation; and
 - (6) Informing the juvenile of the most restrictive disposition on the charge.

As a preliminary matter, we observe that the record on appeal confirms that the trial court did not make the inquiries contained in G.S. § 7B-2407 before accepting the juvenile’s admission that he was in violation of court supervision. Consequently, the trial court erred by “finding” that it had conducted the inquiry contained in that statute. We conclude, however, that Section 7B-2407 does not apply to admissions by a juvenile (or by the juvenile through his attorney) that the juvenile violated conditions of court supervision.

G.S. § 7B-2407 is the juvenile corollary to N.C. Gen. Stat. § 15A-1022(a)(2005), entitled “Advising defendant of consequences of guilty plea” Section 15A-1022 requires the trial court to personally address adult defendants, informing them of certain rights, and to make specific determinations before a guilty plea may be formally accepted. G.S. § 15A-1022(a) provides, in pertinent part, that:

. . . [A] superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

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- (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
- (2) Determining that he understands the nature of the charge;
- (3) Informing him that he has a right to plead not guilty;
- (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
- (5) Determining that the defendant, if represented by counsel, is satisfied with his representation;
- (6) Informing him of the maximum possible sentence on the charge for the class of offense for which the defendant is being sentenced, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge. . . .

G.S. § 15A-1022 is our General Assembly's codification of the principles articulated by the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969). See *State v. McNeill*, 158 N.C. App. 96, 103, 580 S.E.2d 27, 31 (2003). "A defendant's plea must be made voluntarily, intelligently and understandingly." *Id.* (citing *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280).

In North Carolina, G.S. § 15A-1022 has been applied to circumstances where the defendant is accused of committing substantive statutory or common law crimes. See, e.g., *State v. Shelton*, 167 N.C. App. 225, 230, 605 S.E.2d 228, 231 (2004) (no actual entry of defendant's purported guilty plea to two counts of incest "because without engaging in the plea colloquies required by [G.S. § 15A-1022], the trial court cannot and does not accept an offered plea of guilty"); *State v. Carter*, 167 N.C. App. 582, 585, 605 S.E.2d 676, 679 (2004) (guilty plea to breaking and/or entering and larceny was "made knowingly and voluntarily . . . [as] the trial court conducted the inquiry set out in N.C. Gen. Stat. § 15A-1022"). Our research has not revealed any North Carolina authority suggesting that Section 15A-1022 must be used where an adult defendant is accused of violating the terms of adult probation.

Our courts have applied Section 7B-2407 to juvenile delinquency proceedings where it is alleged the juvenile violated a substantive statutory or common law crime. See, e.g., *In Re W.H.*, 166 N.C. App. 643, 646, 603 S.E.2d 356, 359 (2004) (juvenile did not admit to assault inflicting serious bodily injury because "the record does

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not affirmatively show the trial court's compliance with N.C. Gen. Stat. § 7B-2407 . . ."); *In re D.A.F.*, 179 N.C. App. 832, 835, 635 S.E.2d 509, 511 (2006) (felony sexual offense). Respondent has not directed this Court to any authority suggesting Section 7B-2407 is applicable to admissions by juveniles of violations of court supervision, and our research has revealed none.

Moreover, our Supreme Court held that Sections 7B-2407(a) and (b) "must be read in conjunction in determining whether to accept a juvenile's admission of guilt." *In re T.E.F.*, 359 N.C. 570, 573, 614 S.E.2d 296, 298 (2005) (citing *In re Kenyon N.*, 110 N.C. App. 294, 297, 429 S.E.2d 447, 449 (1993)) (other citations omitted) (underlining added). "Guilt" is defined as "[t]he fact or state of having committed a wrong, esp[ecially] a crime." Black's Law Dictionary 727 (8th ed. 2004). One's violation of court supervision is not a distinct "crime" like that associated with violations of statutory and common law offenses. Indeed, in a case concerning double jeopardy, this Court held that "[a] probation violation hearing is not a criminal prosecution." *State v. Monk*, 132 N.C. App. 248, 252, 511 S.E.2d 332, 335 (1999) (citing *State v. Pratt*, 21 N.C. App. 538, 204 S.E.2d 906 (1974)). This Court also observed that a probation violation hearing:

. . . is a proceeding solely for the determination by the court whether there has been a violation of a valid condition of probation so as to warrant putting into effect a sentence theretofore entered; and while notice in writing to defendant, and an opportunity for him to be heard, are necessary, the court is not bound by strict rules of evidence, and all that is required is that there be competent evidence reasonably sufficient to satisfy the judge in the exercise of a sound judicial discretion that the defendant had, without lawful excuse, willfully violated a valid condition of probation.

Id. (quoting *Pratt*, 21 N.C. App. at 540, 204 S.E.2d at 907).

It is also significant that Section 7B-2407 is located in Article 24, captioned "Hearing Procedures." Article 24 concerns, *e.g.*, petitions; adjudicatory hearings; evidence; and burden of proof. Article 24 requires, for example, that allegations in a petition alleging delinquency be proven beyond a reasonable doubt. N.C.G.S. § 7B-2409 (2005).

An entirely different statute, in an entirely different Article of the Juvenile Code, specifically addresses alleged violations of court

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supervision. *See* N.C.G.S. § 7B-2510 (2005) (“Conditions of probation; violations of probation”). Section 7B-2510 is located in Article 25, which concerns “Dispositions.” N.C.G.S. § 7B-2510(e)(2005) provides that violations of court supervision must be proven by a lower burden of proof than that for adjudications of delinquency for substantive statutory and common law offenses:

If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, . . . [or] order a new disposition at the next higher level on the disposition chart

While the General Assembly could have required the colloquy in Section 7B-2407 to apply to alleged violations of court supervision, it did not do so. Instead, it included a motion for review as a form of “dispositional” hearing with procedural safeguards that differ significantly from those imposed on allegations that a juvenile committed a statutory or common law criminal offense.

We conclude that Section 7B-2407 does not apply to an admission by a juvenile (or by the juvenile through his attorney) that the juvenile violated conditions of court supervision. Consequently, the trial court did not err by failing to make the specific inquiries enumerated in G.S. § 7B-2407. The relevant assignments of error are overruled.

Affirmed.

Judges GEER and JACKSON concur.



STATE OF NORTH CAROLINA v. ABRAHAM BERNARD McFADDEN

No. COA06-519

(Filed 2 January 2007)

1. Sentencing— greater sentence after plea bargain rejected—judge’s comment—no suggestion of causation

The trial judge did not err in the sentence imposed where he had commented that the sentence pursuant to a plea bargain would be 117 months, and he ultimately sentenced defendant to 145 to 183 months after defendant rejected the plea bargain. The

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trial judge made no comments at sentencing to suggest that he was imposing the sentence as a result of defendant's rejection of the plea.

2. Appeal and Error—preservation of issues—authority not cited—abandonment of assignment of error

An argument on appeal was taken as abandoned where defendant cited no authority for his assertion that the trial court had violated due process by announcing the sentence he was inclined to give before defense counsel spoke.

3. Robbery—sentencing—aggravated common law robbery—armed robbery—not identical offenses

Aggravated common law robbery and armed robbery do not have identical elements, even when the aggravating factor of use of a deadly weapon is included. There was no plain error in the sentencing classification given to defendant where he contended that he should have been convicted of aggravated common law robbery rather than armed robbery because common law robbery has the lesser sentence. Moreover, defendant was correctly sentenced as an habitual felon.

Appeal by defendant from judgment entered 30 November 2005 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi II, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

HUNTER, Judge.

Abraham Bernard McFadden (“defendant”) appeals from a judgment entered 30 November 2005 consistent with a jury verdict finding him guilty of robbery with a dangerous weapon and habitual felon status. After careful review, we find no error in defendant’s judgment and conviction.

The State’s evidence tended to show that defendant entered the 4 Brothers BP convenience store on 22 March 2005. Defendant removed two twenty-four packs of beer from the cooler and attempted to walk out of the store without paying for the merchandise. One of the clerks on duty, Becky Starling (“Starling”), attempted to grab the

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back of defendant's coat. Defendant turned around and swung a knife at Starling.

Defendant was found guilty of robbery with a dangerous weapon and habitual felon status and was sentenced to 145 to 183 months. Defendant appeals from this judgment and conviction.

I.

[1] In his first assignment of error, defendant contends that the trial court did not impartially sentence defendant. We disagree.

A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights.

State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). "A defendant has the right to plead not guilty, and 'he should not and cannot be punished for exercising that right.'" *State v. Gantt*, 161 N.C. App. 265, 271, 588 S.E.2d 893, 897 (2003) (citation omitted).

"Where it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result."

State v. Poag, 159 N.C. App. 312, 324, 583 S.E.2d 661, 670 (2003) (citation omitted). *Poag* held that statement of the terms of the plea bargain, standing alone, failed to show that the trial court's imposition of a harsher sentence following a jury trial was punishment for rejection of the plea offer. *Id.* *Poag* particularly noted that the trial court did not indicate at sentencing that it was imposing such a sentence as a result of the defendant's rejection of the plea. *Id.*

Defendant contends his sentence was due in part to defendant's decision to ask for a jury trial. Prior to the habitual felon phase of the trial, a short discussion occurred confirming defendant's rejection of a guilty plea as to habitual felon status.

[PROSECUTION]: It is my understanding that [defense counsel] has spoken to [defendant] and would relate to the Court what the

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State had extended in terms of not proceeding with the habitual felon and the Court was going to sentence at the bottom of the presumptive.

THE COURT: To 117 months.

[PROSECUTION]: Yes, and he has rejected that so we will proceed with further instructions to the jury.

No further comments were made by the trial court regarding defendant's sentencing, and after the jury completed its deliberation as to the robbery with a dangerous weapon charge, the trial proceeded to the habitual felon phase. Defendant was ultimately sentenced within the presumptive range to 145 to 183 months.

Defendant contends that the trial court's confirmation that it planned to sentence at the bottom of the presumptive range, in the context of the discussion of the plea agreement offered to defendant, shows prejudice on the part of the trial court in sentencing defendant more harshly because he elected to proceed with a jury trial. However, as in *Poag*, the trial court's brief comment regarding the sentencing range in terms of the plea bargain fails to show that the later imposition of a greater sentence in the presumptive range was a result of defendant's refusal to take the plea bargain. Similar to *Poag*, here the trial judge made no additional comments at sentencing suggesting that it was imposing such a sentence as a result of defendant's rejection of the plea.

[2] Defendant further contends that the trial court violated the Due Process Clause by announcing defendant's prospective sentence before hearing from defense counsel during the sentencing hearing. Following the prosecution's statements regarding aggravating factors, the trial court asked defendant's counsel if she would like to be heard. After defense counsel indicated that she would, the trial court responded as follows:

THE COURT: First of all, let me tell you how I am inclined to sentence him. I am inclined to sentence him to 145 months and that may just limit what you'd like to say.

[DEFENSE COUNSEL]: Your Honor, with that, since you're not going to sentence him at the high end of the presumptive, Your Honor, I would just ask that you sentence him to something reasonable. I'm satisfied with 145 months.

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The trial court then asked defendant if he would like to say anything, and allowed defendant ample time to make a lengthy statement to the court.

Defendant cites no authority for the assertion that the trial court's comment violated due process, merely contending that "any lawyer would know" that speaking further in such a situation would irritate the judge. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." N.C.R. App. P. 28(b)(6). This argument is therefore taken as abandoned and dismissed. *See State v. McNeill*, 360 N.C. 231, 241, 624 S.E.2d 329, 336, cert. denied, — U.S. —, 166 L. Ed. 2d 281 (2006).

As defendant fails to show that the trial court did not impartially sentence defendant in the presumptive range, this assignment of error is overruled.

II.

[3] Defendant next contends the trial court committed plain error in sentencing defendant as a Class D felony as an habitual felon, rather than as a Class G felony as an habitual felon. We disagree.

We first clarify that defendant's actual contention is that he should have been convicted of aggravated common law robbery, a Class G felony, rather than armed robbery, a Class D felony, on the grounds that the two offenses have identical elements. Defendant further contends that, as the two offenses are fungible, under the United States Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), regarding the use of aggravating factors, defendant must be sentenced to the offense with the least possible sentence. We find no merit to this argument.

The elements of the offense of robbery with a dangerous weapon are: "(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened." *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991) (citation omitted); *see also* N.C. Gen. Stat. § 14-87(a) (2005).

Common law robbery is "established where the State shows a 'felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear.'" *State v. Wilson*, 158 N.C. App. 235, 238, 580 S.E.2d 386, 389 (2003)

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(citation omitted); *see also* N.C. Gen. Stat. § 14-87.1 (2005). The aggravating factor which defendant contends, if applied, would have made the crimes identical is found in N.C. Gen. Stat. § 15A-1340.16(d)(10) (2005), that “[t]he defendant was armed with or used a deadly weapon at the time of the crime.”

A review of the elements clearly shows that the two offenses, even with the inclusion of the aggravating factor, are not fungible, as the crime of robbery with a dangerous weapon contains an additional element: That the life of a person is endangered or threatened by the use of the dangerous weapon. *State v. Stewart*, 255 N.C. 571, 572, 122 S.E.2d 355, 356 (1961) (emphasis added) (citation omitted) (holding that the crime of robbery with a dangerous weapon “super-adds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed “with the use or threatened use of . . . firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened” ’ ”). As the two crimes are not identical, as defendant alleges, we find this assignment of error to be without merit. We further note that a review of the record shows that as defendant was convicted of habitual felon status, the trial court properly sentenced defendant as a Class C habitual felon, rather than as a Class D felon.

As defendant fails to show the trial court erred in sentencing defendant in the presumptive range as an habitual felon, we affirm the judgment and conviction.

Affirmed.

Judges MCCULLOUGH and ELMORE concur.

IN THE MATTER OF: D.R.S., W.J.S., MINOR CHILDREN

COA06-504

(Filed 2 January 2007)

1. Termination of Parental Rights— subject matter jurisdiction—personal service at permanency hearing—summons not required

The trial court had subject matter jurisdiction to terminate parental rights where the action began with a petition alleging neglect and dependency; the motion for termination was filed

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more than two years later, so that petitioner was required to serve the motion pursuant to N.C.G.S. § 1A-1, Rule 4; and the motion for termination and the notice were personally served on respondent at a permanency planning hearing. A summons is not required.

2. Appeal and Error—preservation of issues—service of process—not raised before appeal—waiver

An issue regarding service of process in a termination of parental rights hearing was waived where there was no objection at trial.

3. Appeal and Error—preservation of issues—defenses—not raised below—waiver

Defenses of collateral estoppel and res judicata were waived in a termination of parental rights case where they were raised for the first time on appeal.

Appeal by respondent-mother from judgment entered 9 August 2005 by Judge C. Thomas Edwards in Caldwell County District Court. Heard in the Court of Appeals 2 November 2006.

Caldwell County Department of Social Services, by Lauren Vaughan, for petitioner-appellee.

Michael E. Casterline, for respondent-mother.

Michael D. Correll, for respondent-father.

Womble Carlyle Sandridge and Rice, by G. Wriston Marshburn, Jr., for Guardian ad Litem.

LEVINSON, Judge.

Respondent, the mother of the minor children W.J.S. and D.R.S. appeals from an order terminating her parental rights in the children. We affirm.

On 24 March 2000 the petitioner, Caldwell County Department of Social Services (DSS), filed petitions alleging that W.J.S., D.R.S., and another juvenile were neglected and dependent. On 26 April 2000 the children were adjudicated dependent, and placed in the custody of petitioner. On 17 June 2002 petitioner filed a petition to terminate respondent's parental rights in the minor children. After a hearing the trial court on 12 May 2004 entered an order finding that grounds

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existed for termination of parental rights, but that termination was not in the best interests of the children. On 14 December 2004 petitioner filed a motion in the cause seeking termination of parental rights. The petitioner personally served the motion and accompanying notice on respondent at a permanency planning hearing. Following a hearing on the termination of parental rights motion, the trial court on 9 August 2005 entered an order on termination. From this order respondent timely appealed.

[1] Respondent argues that petitioner failed to follow the requirements of N.C. Gen. Stat. § 7B-1102 and § 7B-1106.1 and that, as a result, the trial court lacked subject matter jurisdiction over the termination of parental rights proceeding. We disagree.

At issue is the trial court's subject matter jurisdiction. "Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.'" *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, — (2006) (quoting BLACK'S LAW DICTIONARY 856 (7th ed. 1999)). "Subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial." *In re T.R.P.*, *id.* (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967)). "Moreover, a court's inherent authority does not allow it to act where it would otherwise lack jurisdiction." *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003).

"Under N.C.G.S. § 7B-405 [(2005)], an 'action is commenced by the filing of a petition in the clerk's office[.]'" *In re P.L.P.*, 173 N.C. App. 1, 6, 618 S.E.2d 241, 245 (2005). In the instant case, the action was commenced in April 2000 when DSS filed a petition alleging neglect and dependency. The motion for termination of parental rights was not filed until more than two years after the original action in the case, bringing into play certain provisions of N.C. Gen. Stat. § 7B-1102 (2005):

- (a) When the district court is exercising jurisdiction over a juvenile . . . [an] agency specified in G.S. 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights[.]
- (b) A motion pursuant to subsection (a) of this section and the notice required by G.S. 7B-1106.1 shall be served in accordance with G.S. 1A-1, Rule 5(b), except:

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- (1) Service must be in accordance with G.S. 1A-1, Rule 4, if . . . c. Two years has elapsed since the date of the original action.

N.C. Gen. Stat. § 7B-1102(a)(b)(1)c (2005). Thus, petitioner was required to serve the motion for termination of parental rights and the notice required by N.C. Gen. Stat. § 7B-1106 pursuant to the procedures set out in N.C. G. S. § 1A-1, Rule 4 (2005). In this regard, Rule 4 provides in pertinent part that:

- (c) . . . Personal service . . . as prescribed by Rule 4(j)(1) a and b must be made [after] . . . issuance of summons. When a summons has been served . . . it shall be returned immediately to the clerk who issued it, with notation thereon of its service.
- (j) . . . In any action commenced in a court of this State . . . the manner of service of process within or without the State shall be as follows:
 - (1) Natural Person. . . . [U]pon a natural person by one of the following:
 - (a) By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

In the instant case, it is uncontradicted that both the motion for termination of parental rights and the notice were personally served on respondent at a permanency planning hearing. Under G. S. § 1A-1, Rule 4(j)(1)(a), personal service is an acceptable means of service.

Further, respondent does not argue that the content of either the motion or notice was inadequate. Rather, she argues that petitioner was required to issue a summons instead of a notice, and that the failure to issue a summons stripped the court of jurisdiction. However, G.S. § 7B-1102(b) merely directs the petitioner to serve the motion and notice pursuant to Rule 4, and nowhere suggests that petitioner must issue a summons instead of or in addition to these documents. We conclude that the statute does not require that a summons be issued.

[2] Respondent also asserts that, inasmuch as petitioner failed to issue a summons, it necessarily failed to properly document the service of the nonexistent summons, in that petitioner did not file a return of service with the clerk. Even assuming, *arguendo*, that respondent

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thereby preserved the issue of the return of service of the motion and notice, respondent waived the issue of service of process by failing to object at the trial level. “In the instant case, respondents made no objection at trial regarding any lack of notice of the proceeding. Furthermore, they were represented by counsel and participated in the termination of parental rights hearing. Respondents have waived their right to now object to the adequacy of notice. This assignment of error is without merit.” *In re B.M., M.M., An.M, & Al.M.*, 168 N.C. App. 350, 356, 607 S.E.2d 698, 702 (2005). This assignment of error is overruled.

[3] Respondent argues next that the proceedings for termination of parental rights were barred by principles of collateral estoppel and *res judicata*. However, respondent raises the defenses of collateral estoppel and *res judicata* for the first time on appeal, and thus failed to properly preserve the issue.

N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005) provides in pertinent part that “[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel, . . . *res judicata*, . . . and any other matter constituting an avoidance or affirmative defense.” Rule 8(c). “Failure to plead an affirmative defense ordinarily results in waiver of the defense. . . . [Respondent] neither pled nor tried the case on this theory[.] . . . Accordingly, she cannot now present it on appeal.” *Ward v. Beaton*, 141 N.C. App. 44, 49, 539 S.E.2d 30, 34 (2000) (citing *Nationwide Mut. Insur. Co. v. Edwards*, 67 N.C. App. 1, 6, 312 S.E.2d 656, 660 (1984)); *see also* N.C.R. App. P. 10(b)(1) (“to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make . . . [and] obtain[ed] a ruling upon the party’s request, objection or motion.”). This assignment of error is overruled.

For the reasons discussed above, we conclude that the order for termination of parental rights should be

Affirmed.

Judges GEER and JACKSON concur.

ALLSTATE INS. CO. v. STILWELL

[181 N.C. App. 141 (2007)]

ALLSTATE INSURANCE COMPANY, PLAINTIFF V. ELIZABETH CHANEY STILWELL, ADMINISTRATRIX OF THE ESTATE OF DENNIS RAY STILWELL, JR., DECEASED; GMAC INSURANCE MANAGEMENT CORPORATION; DENNYSE RAYANNE NICOLE STILWELL, A MINOR, DEFENDANT

No. COA05-1393-2

(Filed 2 January 2007)

Insurance— automobile—five vehicles—computer limitations—two policy numbers—one policy

The trial court properly granted summary judgment for plaintiff insurer where two policy numbers were issued to cover five vehicles in one family due to the limitation of plaintiff's computer system. Given language in the policy declarations, the explanatory letters from plaintiff, the billing under one number with the same renewal periods, cross-referencing of the policy numbers, and the fact that the insureds were only charged once for UIM coverage, the insureds had only one policy providing UIM coverage, and there was no genuine issue of material fact as to whether a reasonable person would think that there were two policies.

Appeal by defendant from order entered 28 June 2005 by Judge Robert C. Ervin in the Superior Court in Caldwell County. Originally heard in the Court of Appeals 11 May 2006; reheard pursuant to order issued 19 October 2006.

Morris, York, Williams, Surles & Barringer, L.L.P., by John P. Barringer and Keith B. Nichols, for plaintiff-appellee.

Byrd, Byrd, Ervin, Whisnant & McMahon, P.A., by Robert K. Denton and Lawrence D. McMahon, Jr., for defendant-appellant.

HUDSON, Judge.

On 8 October 2004, plaintiff Allstate Insurance Company ("Allstate") asked the court to declare its obligations regarding insurance policies issued to a driver whose negligence caused the death of Dennis Ray Stilwell, Jr. ("decedent"), the spouse of defendant Elizabeth Chaney Stilwell ("defendant"). Each party moved for summary judgment, and on 21 June 2005, the trial court granted summary judgment to Allstate. Defendant appeals. We affirmed in a decision issued on 1 August 2006. *Allstate v. Stilwell*, 178 N.C. App. 738, 632

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S.E.2d 599 (2006). On 5 September 2006, appellants filed a petition for rehearing, which we allowed in an order filed 19 October 2006. The matter is before us on rehearing. As discussed below, we affirm.

Defendant's spouse died on 22 September 2003 as the result of the negligent operation of a car driven by Joshua Chad Moses. Moses was covered by two liability policies issued by GMAC Insurance, each with liability limits of \$30,000 per person. Defendant reached a settlement with GMAC for \$60,000, exhausting both liability policies, but reserving her right to recover additional damages under any applicable underinsured motorist ("UIM") coverage. At the time of his death, decedent was the son of Dennis and Frankie Stilwell ("the Stilwells"), a resident of their household, and thus, an insured family member under any UIM coverage provided to the Stilwells. The Stilwells had automobile insurance coverage provided by plaintiff. Defendant made a claim for additional damages from plaintiff, contending that Allstate had issued two policies to the Stilwells, each of which included UIM coverage. Allstate countered that only one policy had been issued to the Stilwells with UIM coverage limited to \$50,000, less than the amount defendant recovered from the exhausted liability policies. The present declaratory judgment action ensued.

Defendant argues that the trial court erred granting summary judgment to Allstate based on the ruling that the Stilwells had only a single insurance policy with Allstate. We do not agree.

At the time of decedent's death, he was covered by Allstate policy 130072640, issued to the Stilwells, which covered two of their vehicles. Policy 130072640 provided UIM coverage in the amount of \$50,000. Because of Allstate's computer system limitations and the fact that the Stilwell family owned and insured more than four vehicles, Allstate issued a second policy reference number (13017390), referred to as a multiple record policy ("MRP") number, which covered three additional vehicles. The sworn affidavit of Allstate employee Carol Edens states that policy 130072640 and MRP 13017390 comprised only one automobile insurance policy. Uncontroverted evidence indicates that all policy premiums paid for the Stilwells' five vehicles were billed under policy 130072640 in a single bill. The invoice for policy 130170370 states that UIM coverage for bodily injury is "charged on policy 130072640," and shows no balance due; the invoice for policy 130072640 shows a charge of \$25 for such coverage. In addition, Edens' affidavit indicated that the premiums paid only entitled the Stilwells to UIM coverage in the amount of

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\$50,000 per person. Further, Allstate submitted numerous letters sent to the Stilwells, which were also before the trial court, six before decedent's death and one after, explaining that they had only a single policy with Allstate. These letters explained:

Because you have more than four vehicles to protect, you have two sets of policy Declarations with two policy numbers. In effect, you have one policy with two policy numbers. Coverage for all of your vehicles will renew on the same date, and you'll find both of your policy numbers—as well as your coverages and their costs—listed on your Policy Declarations. And you will receive one bill (which is sent out in a separate mailing) for all vehicles.

Defendant objected to the admission of this evidence, contending that it constituted merely the affiant's legal conclusions. Our review of the affidavit reveals that it contains nothing more than uncontroverted factual assertions about Allstate's billing practices and internal procedures, which the trial court properly considered. Defendant cites *Ridenhour v. Life Ins. Co. of Virginia*, 46 N.C. App. 765, 769, 266 S.E.2d 372, 374 (1980), for the proposition that an insurance agent's interpretation of the terms of an insurance policy is not admissible to contradict the written policy. Defendant argues in the petition that the letters and Edens' affidavit were used "to vary or contradict the express language of the written policy." Upon our review of these documents, however, we conclude that the letters and affidavits clarify, but do not contradict the terms of the written policy declarations.

In *Iodice v. Jones*, plaintiffs sought "declaratory judgment on the issue of whether they had purchased one or two underinsured motorist (UIM) policies from GEICO [their automobile insurance company]." 135 N.C. App. 740, 741, 522 S.E.2d 593, 593 (1999). In *Iodice*, GEICO had informed the plaintiffs that only three vehicles could be covered under a single policy and that, in order to cover their fourth vehicle GEICO "would need to issue a second policy." *Id.* at 742, 522 S.E.2d at 594. In addition, GEICO sent plaintiffs separate billings with different renewal dates for each policy. *Id.* Most importantly, "GEICO submitted affidavits, in response to Plaintiffs' request for the production of documents, plainly stating that separate policies of insurance were 'issued.'" *Id.* at 745, 522 S.E.2d at 596. Although GEICO submitted an affidavit from an underwriting manager stating the second policy was only an extension and not a separate policy, this Court concluded that this contradictory evidence revealed "noth-

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ing more than an ambiguity with respect to the question of whether there is one policy or two policies[.]” *Id.*

Here, unlike the insurance company in *Iodice*, Allstate has not conceded that it issued two different policies, but has consistently maintained, in its letters to the Stilwells and in its affidavits filed in response to this litigation, that it issued the Stilwells only a single policy. It is well-established that insurance contracts should be given the construction of a reasonable person in the position of the insured. *Register v. White*, 358 N.C. 691, 699, 599 S.E.2d 549, 556 (2004). Given the language in the declarations, along with explanatory letters from Allstate, the billing under one number with the same renewal periods, the cross-referencing of the policy numbers, and the fact that the Stilwells were only charged once for UIM coverage, we do not see a genuine issue as to whether a reasonable person would think she had two policies. Thus, we conclude that the trial court properly granted summary judgment to plaintiff.

Affirmed.

Judges McCULLOUGH and TYSON concur.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

STATE OF NORTH CAROLINA v. CHRISTOPHER A. HASTY

No. COA06-532

(Filed 2 January 2007)

1. Homicide— short-form murder indictment—aggravating factors not required

Aggravating factors were not required to be alleged in a short-form murder indictment.

2. Sentencing— jury finding needed for increased sentence—rule not retroactively applied

The rule of *Blakely v. Washington*, 542 U.S. 296, concerning increased sentences without a jury finding or a stipulation, did not apply here because defendant’s case was final at the time

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Blakely was issued. Defendant later moved for a writ of certiorari from the Court of Appeals.

Appeal by defendant from judgment entered 10 August 1998 by Judge William C. Griffin in New Hanover County Superior Court. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John C. Evans, for the State.

McAfee Law, P.A., by Robert J. McAfee, for defendant-appellant.

HUNTER, Judge.

Christopher A. Hasty (“defendant”) appeals from a judgment entered 10 August 1998 pursuant to a guilty plea to second degree murder. For the reasons stated herein, we affirm the judgment and conviction of the trial court.

Defendant was indicted for the first degree murder of Pernisia L. Parker (“Parker”) on 9 September 1997. Defendant pled guilty to second degree murder, along with other drug related charges unrelated to this appeal. The factual basis for the guilty plea showed that defendant strangled Parker, who was eight months pregnant at the time of her death. Defendant then drove Parker’s body to the edge of a remote wooded lot. Defendant returned on several occasions, attempting unsuccessfully to bury the body.

At the hearing on 10 August 1998, defendant introduced evidence of two mitigating factors: Early acknowledgment of wrongdoing and mental condition not constituting a defense. The State introduced, without objection, evidence of one aggravating factor: Parker was eight months pregnant at the time of her murder. The trial court found that the aggravating factor outweighed the mitigating factors and sentenced defendant in the aggravated range to 276 to 341 months for the second degree murder charge.

On 9 January 2002, defendant filed a writ of certiorari with this Court, which was granted on 29 January 2002, but limited review to those issues which could have been raised on direct appeal pursuant to N.C. Gen. Stat. § 15A-1444(a1) and (a2). This Court also ordered the New Hanover County Superior Court to hold a hearing to determine whether defendant was entitled to appointment of counsel.

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No further action was taken. On 18 November 2005, defendant filed a petition for a writ of mandamus to require the New Hanover County Superior Court to comply with the 29 January 2002 order. This Court granted the writ of mandamus on 12 December 2005. Defendant was appointed counsel thereafter and proceeded with the appeal now before us.

I.

[1] Defendant first contends, in related assignments of error, that the trial court erred in finding an aggravating factor and in sentencing defendant in the aggravated range when the indictment did not allege an aggravating factor. We disagree.

In *State v. Hunt*, 357 N.C. 257, 272, 582 S.E.2d 593, 603 (2003), our Supreme Court held conclusively that short-form murder indictments are not required statutorily or constitutionally to include aggravators in a state court indictment. Here, defendant was indicted using the short-form murder indictment, and therefore the aggravating factors were not required to be alleged. The assignment of error is overruled.

II.

[2] Defendant next contends that the sentence imposed by the trial court was not a type authorized without a jury finding or stipulation to the aggravating factor under the holding in *Blakely v. Washington*. We disagree.

Defendant contends that the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), holding any facts other than prior convictions, including aggravating sentencing factors, which "increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,] " *id.* at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)), is controlling. *Blakely* created a new rule for the conduct of criminal prosecutions. The United States Supreme Court has previously held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Griffith v. Kentucky*, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661 (1987); *see also State v. Lucas*, 353 N.C. 568, 598, 548 S.E.2d 712, 732 (2001), overruled on other grounds by *State v. Allen*, 359 N.C. 425, 615 S.E.2d

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256 (2005); *State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000). The United States Supreme Court's decision in *Blakely v. Washington* was issued 24 June 2004.

Here, defendant's case was final in 1998, when his plea of guilty was accepted and judgment entered. Defendant did not take a direct appeal from that judgment, but rather moved for a writ of certiorari from this Court in 2002. As defendant's case was not pending on direct review and was final at the time the rule in *Blakely* was issued, the rule cannot be retroactively applied to defendant's appeal before this Court by writ of certiorari. See *State v. Pender*, 176 N.C. App. 688, 693-94, 627 S.E.2d 343, 347 (2006).

As the aggravating factor was not required to be alleged in the short-form murder indictment, and as the rule issued by the United States Supreme Court in *Blakely* does not retroactively apply to defendant's case, we affirm defendant's judgment and conviction.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JANUARY 2007

DEEM v. HBE CORP. No. 06-381	Indus. Comm. (I.C. #141741)	Affirmed
GILREATH v. YELLOW CAB OF CHARLOTTE No. 06-262	Indus. Comm. (I.C. #917389)	Affirmed
HOWARD v. UNC-CHAPEL HILL No. 06-487	Indus. Comm. (I.C. #149985)	Affirmed
IN RE A.V., I.V., S.D., T.T., C.T. No. 06-535	Harnett (04J221-25)	Affirmed
IN RE B.R.H. No. 06-606	Johnston (05J94)	Affirmed
IN RE BROWN No. 06-399	Pitt (05CRS15544-45)	Affirmed
IN RE C.C.L. No. 06-462	Mecklenburg (03J1240)	Affirmed
IN RE C.E.M. & Z.C.M. No. 06-514	Alamance (04J134-35)	Affirmed in part, dis- missed in part
IN RE Da.A., De.A. No. 06-273	Forsyth (03J125) (03J144)	Affirmed in part; re- versed and remanded in part
IN RE J.D.F. No. 06-423	Mitchell (02J7)	Reversed and remanded
IN RE J.D.T. No. 06-245	New Hanover (04J338)	Reversed in part; Affirmed in part
IN RE J.L.D., J.L.D., L.R.H. No. 06-44	Wake (05J140)	Affirmed
IN RE J.M.N.-W. No. 06-588	Wake (05J374)	Affirmed
IN RE J.T.R. No. 06-996	Randolph (05J163)	Affirmed
IN RE M.D.D. No. 06-657	Randolph (05J117)	Affirmed
IN RE R.B. & A.M. No. 06-484	Wayne (04JA244-45)	Affirmed in part, vacated in part and remanded

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IN RE S.E.R., II No. 06-222	Orange (03J105)	Affirmed
IN RE S.F. No. 06-297	Polk (03J23)	Affirmed
IN RE S.L.G. No. 06-125	Halifax (03J10)	Affirmed
IN RE S.M., C.E., E.E. No. 06-842	Wake (05J485)	Affirmed
KOSEK v. BARNES No. 06-76	Mecklenburg (03CVS8228)	Affirmed
McDOWELL v. STATE FARM MUT. AUTO. INS. CO. No. 06-536	Durham (05CVS4025)	Reversed
MUELLER v. BRANTLEY No. 06-530	Pitt (02CVS3034)	Dismissed
MUELLER v. BRANTLEY No. 06-759	Pitt (02CVS3034)	Affirmed
PENN v. TOWN OF WRIGHTSVILLE BEACH No. 06-502	New Hanover (04CVS4220)	Affirmed
QUBAIN v. GRANBERRY No. 06-444	Wake (95CVS11730)	Affirmed
RED DIRT PROPS., LLC v. PRIME BLDG. CO. No. 06-387	Wake (04CVS10922)	Affirmed
S.F. HOLDINGS OF WILMINGTON v. TOWN OF KURE BEACH No. 06-367	New Hanover (05CVS921)	Affirmed
SOTO v. BUCHANAN No. 06-142	Wake (02CVS16980)	Affirmed
STATE v. BARNES No. 06-166	Wake (04CRS57160)	No error
STATE v. BRACAMONTES No. 06-259	Forsyth (04CRS62625-26)	No error
STATE v. CARTER No. 05-1235	Bladen (02CRS53144) (02CRS53154)	No error

STATE v. CHEVALIER No. 06-552	Sampson (05CRS51367)	No error
STATE v. CRUMP No. 06-411	Forsyth (04CRS23964) (04CRS24439)	No error
STATE v. CULBERTSON No. 06-479	Union (99CRS12170-71) (00CRS51429)	Vacated in part, no error in part
STATE v. DANIELS No. 06-282	Durham (01CRS6233-34)	No error in part, dis- missed without preju- dice in part
STATE v. EDWARDS No. 06-12	Buncombe (02CRS52454) (04CRS7945-53)	No error
STATE v. FOXX No. 06-437	Chatham (05CRS51327-28)	No error
STATE v. GARRETT No. 06-255	Jackson (04CRS52958)	No error
STATE v. HENDRICKS No. 05-1465	Guilford (03CRS24477) (03CRS86195)	No error
STATE v. JEFFRIES No. 06-135	Guilford (05CRS76050-51) (05CRS76307)	No error
STATE v. NELSON No. 06-430	Onslow (04CRS52277-80)	No error in part; re- versed in part and remanded for resen- tencing consistent with this opinion
STATE v. NELSON No. 05-1677	Rockingham (05CRS51021)	No prejudicial error
STATE v. RABON No. 06-121	Pender (05CRS50665)	No error
STATE v. RANDOLPH No. 06-252	Pitt (03CRS58462) (04CRS18416)	No error
STATE v. STITT No. 06-238	Iredell (03CRS58699)	No error
STATE v. STONEMAN No. 06-74	Guilford (04CRS100472) (04CRS100474) (05CRS24189)	No error

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STATE v. STREATERS No. 05-1665	Union (02CRS51779) (02CRS51380-81) (02CRS5188-89) (02CRS51392)	No prejudicial error
STATE v. VANN No. 06-584	Columbus (04CRS53546)	No error
STATE v. VELAZQUEZ No. 06-219	Forsyth (04CRS61159-60)	Affirmed
STATE v. WALTERS No. 06-114	Rockingham (04CRS6927) (04CRS6929-30)	No error
THREE RIVERS VALLE, LLC v. GROVE PARK INN RESORT, INC. No. 05-1427	Buncombe (04CVS4265)	Affirmed
WASHINGTON MUT. BANK, FA v. HARGROVE No. 06-409	Vance (05CVS292)	Affirmed

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FREIDA FOSTER, TAMI BORLAND, AND KATHY BOWEN, PLAINTIFFS V.
JASON M. CRANDELL AND PSIMED, P.A., DEFENDANTS

No. COA05-1140

(Filed 2 January 2007)

1. Appeal and Error—appealability—partial summary judgment—Rule 54(b) certification—substantial right

Although plaintiff Foster's appeal from the entry of partial summary judgment is properly before the Court of Appeals based on the trial court's Rule 54(b) certification, and all three plaintiffs' issues of punitive damages can be reviewed based on a substantial right to have the claim determined by the same judge and jury which heard the claim for compensatory damages, the remaining appeals are from interlocutory orders and are premature because: (1) there is no basis for appeal under Rule 54(b) of the exclusion of the negligent medicine management theory in the absence of a final judgment on the remaining plaintiffs' medical malpractice claim for relief, and the trial court's evidentiary ruling regarding plaintiffs' clinical pharmacist expert witness did not constitute a final judgment as a claim for relief; (2) with respect to both defendants' cross-appeal from the partial summary judgment order as well as defendants' appeal from the order denying their motion for judgment on the pleadings, no final judgment has been entered with respect to any defendant or claim for relief; (3) the remaining plaintiffs made no assertion that rulings regarding negligence in medicine management and the exclusion of an expert witness's testimony affect a substantial right; (4) defendants rely solely on a settlement agreement with an accompanying dismissal, meaning there was no possibility of a result inconsistent with a prior jury verdict or a prior decision by a judge; (5) defendants failed to demonstrate the existence of a substantial right with respect to their appeal when they base their claim of res judicata on a prior voluntary dismissal with prejudice that does not reflect a ruling on the merits by any jury or judge; and (6) defendants' request during oral arguments that the Court of Appeals grant certiorari to review their contentions falls short of the requirements of N.C. R. App. P. 21, and defendants have pointed to no circumstances that would justify the exercise of the Court of Appeals' discretion to suspend the requirements of Rule 21 under N.C. R. App. P. 2.

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2. Medical Malpractice— negligent supervision—statutes of limitation and repose

Plaintiff Foster's claims against defendant medical director of a Christian counseling service for injuries allegedly received during counseling by a pastor constituted medical malpractice claims for purposes of the statutes of limitation and repose where plaintiff asserted personal injury claims against defendant director that are premised entirely upon defendant's negligent or reckless failure, as the supervising clinical psychiatrist, to adequately utilize his specialized knowledge and skill to supervise the pastor's counseling practices.

3. Statutes of Limitation and Repose— medical malpractice claims—issue of material fact

Plaintiff presented sufficient evidence to present genuine issues of material fact as to whether plaintiff's medical malpractice claims against the medical director of a Christian counseling service were filed within the three-year statute of limitations and the four-year statute of repose. N.C.G.S. § 1-15(c).

4. Emotional Distress— intentional infliction—improper supervision—insufficient showing of outrageous conduct

Plaintiff's evidence of the failure of defendant medical director of a Christian counseling service to properly supervise the pastor who counseled plaintiff did not constitute extreme and outrageous conduct necessary to establish a claim for intentional infliction of emotional distress where plaintiff did not suggest that defendant failed to disclose information about sexual misconduct by the pastor but contended that defendant failed to disclose that the N.C. Board of Licensed Counselors had demanded that the pastor cease the practice of counseling.

5. Emotional Distress— negligent infliction—failure to supervise counselor

Plaintiff presented a sufficient forecast of evidence to present a genuine issue of material fact supporting her claim for negligent infliction of emotional distress by defendant medical director of a Christian counseling service based upon his failure to properly supervise the pastor who counseled plaintiff where defendant does not contend that plaintiff failed to present sufficient evidence of negligence; a physician's affidavit explained how defendant's negligence caused plaintiff severe emotional distress and, with plaintiff's other summary judgment evidence, was suffi-

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cient to raise a genuine issue of material fact as to whether it was reasonably foreseeable that severe emotional distress could result in the pastor's clients if defendant negligently failed to supervise him; and plaintiff offered evidence that she suffered diagnosable mental health conditions as a result of defendant's alleged negligence.

6. Employer and Employee— negligent hiring or retention— insufficient evidence

Defendant medical director of a Christian counseling service could not be liable for negligent hiring or retention of a pastor who counseled plaintiff where there was no evidence that defendant employed the pastor either as an employee or an independent contractor, and the evidence showed, at most, that defendant and the pastor were at one point co-employees.

7. Damages and Remedies— punitive damages—requirement of participation

A pastor's behavior in counseling plaintiffs, including any sexual misconduct, cannot serve as a basis for plaintiffs to obtain punitive damages from the medical director of a Christian counseling service because punitive damages may be awarded against a person only if that person participated in the conduct giving rise to the punitive damages.

8. Damages and Remedies— punitive damages—insufficient evidence showing genuine issue

Plaintiff Foster did not establish a claim for punitive damages where summary judgment was properly entered for defendant on her claims for intentional infliction of emotional distress and negligent supervision. Furthermore, the other two plaintiffs failed to establish claims for punitive damages where they relied only upon their allegations of intentional infliction of emotional distress and "reckless supervision" and failed to present clear and convincing evidence of willful or wanton conduct in support of their claims.

Appeal by plaintiffs and cross-appeal by defendants from order entered 13 June 2005 by Judge Lindsay R. Davis, Jr. and appeal by defendants from order entered 20 August 2004 by Judge A. Moses Massey in Forsyth County Superior Court. Heard in the Court of Appeals 9 May 2006.

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*Gray Newell, LLP, by Angela Newell Gray, for plaintiffs.**Carruthers & Roth, P.A., by Jack B. Bayliss, Jr. and William J. McMahon, for defendants.*

GEER, Judge.

This appeal arises out of an order of the trial court granting summary judgment to defendants in part, denying summary judgment in part, and excluding one of plaintiffs' expert witnesses. All parties have appealed. Because this is an interlocutory appeal, we have limited our review only to those questions over which we have jurisdiction: (1) the entry of summary judgment on all of Freida Foster's claims; and (2) the entry of summary judgment on plaintiffs' claims for punitive damages. We dismiss the parties' appeals with respect to the remaining issues since they are not properly the subject of a Rule 54(b) certification and do not affect a substantial right.

With respect to Foster's claims, we hold that she has presented sufficient evidence to raise an issue of fact as to whether she has complied with the statute of limitations and the statute of repose. We agree with defendants, however, that she has submitted sufficient evidence to support only a negligent infliction of emotional distress ("NIED") claim against defendant Jason M. Crandell, M.D. The trial court's entry of summary judgment is, therefore, reversed only as to Foster's NIED claim against defendant Crandell. We also uphold the trial court's entry of summary judgment as to plaintiffs' punitive damages claims based on plaintiffs' failure to forecast sufficient evidence to meet the standard for punitive damages set forth in N.C. Gen. Stat. § 1D-15(a) (2005).

Facts

In the early 1990s, Michael Rivest was the pastor of a small congregation of the Charismatic Episcopal Church and had established Isaiah 61 Ministries, Inc. ("Isaiah 61"), which was providing Christian counseling as the St. Matthew's Institute for Healing and Growth ("St. Matthew's Institute"). In 1994, Crandell agreed to work more closely with Rivest as a referral for any of Rivest's clients who could potentially benefit from medical management.

Crandell thereafter became the medical director of Isaiah 61, and a brochure for Isaiah 61 and St. Matthew's Institute listed him as the organization's psychiatrist. In that position, Crandell provided general advice on conducting a counseling practice, made periodic

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review of Rivest's counseling reports, and answered counseling-related questions from Rivest and other counselors at Isaiah 61. From late 1996 until 2001, Crandell was also involved in a Bible-study group with Rivest and was Rivest's personal physician.

In June 1995, the North Carolina Board of Licensed Professional Counselors (the "Board") sent Rivest a letter directing him to cease and desist from providing counseling services, as he appeared to be engaged in the unlicensed practice of counseling in violation of the North Carolina Licensed Professional Counselors Act. Rivest responded to the Board by stating that he was under the "direct supervision" of Crandell. Crandell sent a similar letter to the Board, noting that he was employed by Isaiah 61 "to provide a supervisory relationship" to Rivest and, therefore, that Rivest was exempted from the Act's licensure requirement under N.C. Gen. Stat. § 90-332.1(a)(4) (2005) (stating that the Act does not apply to "[a]ny person counseling as a supervised counselor in a supervised professional practice"). The Board agreed to this arrangement and sent Rivest a letter stating that he was exempt from the Act.

In September 1996, however, the Board sent Crandell another letter indicating that it had reinterpreted the exemption found in N.C. Gen. Stat. § 90-332.1(a)(4) for supervised unlicensed counseling. The Board's new interpretation construed the exemption as applying only to counselors who were under temporary supervision while attempting to meet the licensure requirements of N.C. Gen. Stat. § 90-336(b)(2) (2005). According to Crandell, he then terminated his employment with Isaiah 61, but continued to review counseling session reports "[a]s a courtesy" until 1998. Plaintiffs, on the other hand, contend Crandell's supervisory relationship extended beyond 1998 for an unspecified period.

In December 1998, the Board sent Rivest another cease and desist letter, copied to Crandell, that again noted N.C. Gen. Stat. § 90-332.1(a)(4) no longer applied to Rivest's situation. Rivest's response, also copied to Crandell, stated that Isaiah 61 and St. Matthew's Institute were no longer charging fees for counseling services, and, therefore, were now exempt from the Act under N.C. Gen. Stat. § 90-332.1(a)(5) (stating that the Act does not apply to "[a]ny ordained minister or other member of the clergy while acting in a ministerial capacity who does not charge a fee for the service"). Foster later testified that, in lieu of fees, she and the other plaintiffs were, at that time, expected to make "donations" to Rivest for his counseling services.

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Plaintiff Tami Borland began Christian counseling at the St. Matthew's Institute in 1994 in an effort to save her marriage. After first receiving counseling from another counselor, Borland began regular counseling with Rivest's wife, Kathleen. By 1996, however, Borland had begun counseling exclusively with Rivest and, by 1997, had joined his religious sect, the "Cistercian Oblates," which required that she wear a nun's habit.

In 1998, Rivest informed Borland that he believed she was experiencing "stigmata pain," which, according to Rivest, was "pain associated with that of Christ when Christ was nailed to the cross." Rivest told Borland that she needed medication and personally took her to see Crandell. Rivest explained that he "had a business relationship" with Crandell in which Crandell supervised Rivest's counseling sessions, reviewed his counseling notes and records, served as his advisor, and "sign[ed] off" on everything Rivest did.

While in Crandell's office, Rivest explained stigmata pain and provided Crandell "with literature and written documents that pertained to stigmata so that Dr. Crandell could educate himself . . ." Crandell explained to Borland that Rivest was "very qualified" and that "he deferred to [Rivest's] recommendations on a regular basis with regard to diagnoses." Crandell also told Borland that, if Rivest believed she was experiencing stigmata pain, then that was surely the source of her problem. Crandell thereafter started Borland on a treatment plan that included medication and regular counseling sessions with Crandell to "talk[] about [the] pain associated with [her] stigmata."

In early 2000, Borland had a falling out with Rivest and terminated their relationship. Although she continued her sessions with Crandell, she became concerned that he was communicating with Rivest about her therapy without her permission. When Borland expressed this concern to Crandell in February 2000, he advised her that she should "seek treatment elsewhere because he did have an ongoing supervisory relationship" with Rivest. Crandell thereafter referred Borland to another mental health facility.

Plaintiff Kathy Bowen began grief counseling with Rivest in 1997, following the death of her mother. Rivest told Bowen that he and Crandell "had a psychiatric/counseling business" and that Crandell oversaw Rivest's counseling and advised Rivest with respect to all of his clients. Bowen was ultimately treated by both Rivest and Crandell. During several of her therapy sessions with Crandell, he indicated to Bowen that he was "aware of everything that was going

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on with [her]" because "he shared information with . . . Rivest due to his supervisory relationship over Rivest." Bowen also joined the Cistercian Oblates and began wearing a nun's habit.

In July 1999, Rivest notified Bowen in writing that he had "consulted today with both our Medical Director and Clinical Supervisor regarding [her] case," and that they had concluded her therapy sessions should be terminated. A copy of the letter was sent to Crandell. Bowen ended her relationship with both Rivest and Crandell in 2000. Nevertheless, in April 2001, after not having treated Bowen as a patient for nearly six months and just after she had filed a complaint with the Charismatic Episcopal Church alleging sexual abuse by Rivest, Crandell unexpectedly called Bowen at home and asked if she "needed [any] medication."

In 1998, following the death of her fiancée, plaintiff Frieda Foster began grief counseling with Rivest. Rivest told her that Crandell provided Rivest with "outside supervision" and, according to Rivest, reviewed Rivest's counseling notes, was aware of matters discussed in therapy, and assisted Rivest with developing treatment plans. Rivest told Foster that, if it became necessary during her counseling for her to receive medication, Rivest could refer her to Crandell.

Foster continued to seek treatment with Rivest over the following year, visited his church, and soon also wore a nun's habit as a member of the Cistercian Oblates, which by that time consisted entirely of Rivest, Borland, Bowen, and Foster. By mid-1999, Foster had become estranged from her family, who believed she was developing an obsession with Rivest, and was attending counseling with Rivest five to six days per week. By 2000, Foster had given Rivest over \$50,000.00.

Foster ultimately began to doubt the efficacy of Rivest's counseling services and terminated their relationship in 2001. Although Rivest had mentioned Crandell to Foster several times, she never had a conversation with Crandell pertaining to her therapy, and Crandell never took part in her counseling sessions with Rivest.

On 26 October 2001, Borland, Bowen, and Foster filed suit against Isaiah 61 and Rivest, each alleging: (1) Rivest had taken "certain indecent liberties" with them that "were intended for the sexual gratification of Rivest"; (2) they had engaged in "intimate acts" with Rivest "involuntarily and without consent"; and (3) Rivest had used "mind control techniques, threats and intimidation to illegally obtain money" from them. The parties settled in May 2004, and Borland,

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Bowen, and Foster voluntarily dismissed their suit against Rivest and Isaiah 61 with prejudice on 9 June 2004.

On 27 December 2002, prior to their settlement with Rivest and Isaiah 61, Borland, Bowen, and Foster filed their initial suit (02 CVS 8569) against Crandell and his employer, PsiMed, P.A. In their complaint, plaintiffs again alleged inappropriate acts by Rivest, but also added allegations regarding Crandell's supervisory authority over Rivest's practices, claiming they were entitled to recover for the injuries they incurred under Rivest's counseling from Crandell as a result of his inadequate supervision of Rivest and from PsiMed as a result of its inadequate supervision of Crandell.

On 16 June 2003, plaintiffs voluntarily dismissed that action without prejudice pursuant to N.C.R. Civ. P. 41(a)(1)(i). They subsequently filed a second action (04 CVS 3741) against Crandell and PsiMed on 14 January 2004, containing substantially the same allegations. Plaintiffs amended their complaint on 16 September 2004 to provide additional detail with respect to Crandell's supervision of Rivest.

After answering plaintiffs' complaint, defendants moved for judgment on the pleadings, claiming that plaintiffs' prior settlement with Rivest and Isaiah 61 precluded recovery in this action. Judge A. Moses Massey denied defendants' motion on 20 August 2004. On 18 April 2005, following discovery, defendants moved for summary judgment, again arguing, among other grounds, that the prior settlement barred plaintiffs' recovery, but also seeking judgment on all of plaintiffs' claims based on the statute of limitations, the statute of repose, and insufficient evidence. In addition, defendants moved to exclude the testimony of plaintiffs' two expert witnesses: clinical pharmacist Thomas E. Henry, III and psychiatrist Dr. James F. T. Corcoran.

On 13 June 2005, Judge Lindsay R. Davis, Jr. entered an order (the "Partial Summary Judgment Order") and a detailed memorandum of decision. With respect to the effect of the prior settlement, Judge Davis ruled that defendants' motion for summary judgment presented no new arguments and resolution of the motion in defendants' favor on that basis would effectively overrule Judge Massey's order. For that reason, Judge Davis denied defendants' motion for summary judgment to the extent it relied on the prior settlement.

As for Foster's claims, the trial court determined that they were barred by the four-year statute of repose for medical malpractice

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actions and, therefore, granted defendants summary judgment as to those claims. The court concluded that Borland's and Bowen's claims were not time-barred and that Borland and Bowen had presented sufficient evidence to defeat summary judgment except for their claim of negligence in the management of their medications.¹ The trial court further granted summary judgment as to plaintiffs' claims for punitive damages.

Plaintiffs and defendants have both appealed from the Partial Summary Judgment Order. Additionally, defendants have appealed from Judge Massey's order denying their motion for judgment on the pleadings.

Interlocutory Nature of the Appeal

[1] We first observe that this appeal is interlocutory. An order is interlocutory if it does not dispose fully of a case, but rather requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Because the Partial Summary Judgment Order left intact Borland's and Bowen's claims for intentional and negligent infliction of emotional distress, negligent supervision, and medical malpractice, the parties' appeal is interlocutory. See *Liggett Group Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993) ("A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.").

This Court has jurisdiction over an interlocutory appeal only if (1) the trial court certified the order for immediate review under North Carolina Rule of Civil Procedure 54(b), or (2) the order affects a substantial right that would be lost without immediate review. *Embler v. Embler*, 143 N.C. App. 162, 164-65, 545 S.E.2d 259, 261 (2001). Here, the Partial Summary Judgment Order included a Rule 54(b) certification.

Rule 54(b), in pertinent part, provides:

When more than one claim for relief is presented in an action, . . . the court may enter a final judgment as to one or more but fewer than all of the claims . . . only if there is no just reason

1. In connection with the medical management issue, the trial court granted defendants' motion to exclude the testimony of Thomas Henry, a licensed pharmacist and one of plaintiffs' expert witnesses. The court, however, denied the motion to exclude the testimony of plaintiffs' second expert witness, James Corcoran, M.D.

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for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C.R. Civ. P. 54(b). “Nonetheless, the trial court may not, by [Rule 54(b)] certification, render its decree immediately appealable if ‘[it] is not a final judgment.’” *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (second alteration original) (quoting *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983)).

Since the Partial Summary Judgment Order entered a final judgment as to all of Foster’s claims, her appeal is properly before this Court pursuant to the trial court’s Rule 54(b) certification. We reach a different conclusion, however, with respect to the remaining parties’ appeals.

Borland’s and Bowen’s claims premised upon Crandell’s alleged negligent medication management do not represent a separate claim for relief, but rather constitute simply one factual theory, among others, as to how Crandell committed medical malpractice. In the absence of a final judgment on plaintiffs’ medical malpractice claim for relief, there is no basis for appeal under Rule 54(b) of the exclusion of the negligent medicine management theory. Likewise, the trial court’s evidentiary ruling regarding Mr. Henry does not constitute a final judgment as to a claim for relief.

Similarly, with respect to both defendants’ cross-appeal from the Partial Summary Judgment Order as well as defendants’ appeal from the order denying their motion for judgment on the pleadings, no final judgment has been entered with respect to any defendant or claim for relief. See *Yordy v. N.C. Farm Bureau Mut. Ins. Co.*, 149 N.C. App. 230, 231, 560 S.E.2d 384, 385 (2002) (“A defense raised by a defendant in answer to a plaintiff’s complaint is not a ‘claim’ for purposes of Rule 54(b).”). Consequently, the trial court’s Rule 54(b) certification is also ineffective to bring defendants’ appeals properly before this Court. See, e.g., *Wood v. McDonald’s Corp.*, 166 N.C. App. 48, 53, 603 S.E.2d 539, 543 (2004) (addressing, under Rule 54(b) certification, the plaintiff’s appeal from an order granting the defendants partial summary judgment, but dismissing the defendants’ cross-appeal as interlocutory).

We next turn to the question whether the parties have demonstrated the existence of a substantial right. The Supreme Court has

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previously held that plaintiffs have a substantial right in having their “claim for punitive damages determined, if at all, before the same judge and jury which heard the claim for compensatory damages.” *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 493, 251 S.E.2d 443, 448 (1979). Accordingly, we have jurisdiction to review the trial court’s entry of summary judgment on the issue of punitive damages. As for Borland’s and Bowen’s arguments regarding negligence in medicine management and the exclusion of Mr. Henry’s testimony, they have made no assertion that those rulings affect a substantial right. An appellant bears the burden of establishing the existence of a substantial right, *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262, and, as we have previously stressed, “[i]t is not the duty of this Court to construct arguments for or find support for appellant’s right to appeal from an interlocutory order” *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Accordingly, we do not address Borland’s and Bowen’s arguments regarding negligent medicine management and the exclusion of Mr. Henry’s testimony. They may assert those arguments on any appeal from the entry of a final judgment.

Defendants, on the other hand, have specifically argued that both the order denying their motion for judgment on the pleadings and the Partial Summary Judgment Order affect a substantial right because, according to defendants, plaintiffs’ claims are barred by res judicata and collateral estoppel as a result of plaintiffs’ settlement and voluntary dismissal with prejudice of their claims against Rivest and Isaiah 61. When a trial court enters an order rejecting the affirmative defenses of res judicata and collateral estoppel, the order “can affect a substantial right and may be immediately appealed.” *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001). Incantation of the two doctrines does not, however, automatically entitle a party to an interlocutory appeal of an order rejecting those two defenses.

This Court has previously limited interlocutory appeals to the situation when the rejection of those defenses gave rise to a risk of two actual trials resulting in two different verdicts. See, e.g., *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 167, 519 S.E.2d 540, 546 (1999) (holding that an order denying a motion based on the defense of res judicata gives rise to a “substantial right” only when allowing the case to go forward without an appeal would present the possibility of inconsistent jury verdicts),

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disc. review denied, 351 N.C. 352, 542 S.E.2d 207 (2000); *Northwestern Fin. Group, Inc. v. County of Gaston*, 110 N.C. App. 531, 536, 430 S.E.2d 689, 692 (holding that the defense of res judicata gives rise to a “substantial right” only when there is a risk of two actual trials resulting in two different verdicts), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). One panel, however, has held that a “substantial right” was affected when defendants raised defenses of res judicata and collateral estoppel based on a prior federal summary judgment decision rendered on the merits. See *Williams v. City of Jacksonville Police Dep’t*, 165 N.C. App. 587, 589-90, 599 S.E.2d 422, 426 (2004).

We need not, however, reconcile *Country Club, Northwestern*, and *Williams* in this case, since they all involve a prior determination on the merits by either a jury or a judge—a circumstance lacking in this case. Because defendants rely solely on a settlement agreement with an accompanying dismissal, there is no possibility of a result inconsistent with a prior jury verdict or a prior decision by a judge. This case more closely resembles this Court’s decisions in *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003), and *Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453, *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005).

In *Allen*, the plaintiff had previously twice dismissed her claims under N.C.R. Civ. P. 41(a)(1), with the result that the second dismissal was with prejudice. This Court rejected the defendants’ contention that the trial court’s order denying their motion to dismiss the action based on the prior dismissal affected a substantial right. *Allen*, 161 N.C. App. at 522, 588 S.E.2d at 497. The Court explained: “This Court has previously stated that avoidance of a trial, no matter how tedious or unnecessary, is not a substantial right entitling an appellant to immediate review.” *Id.* *Robinson* involved the same procedural facts as *Allen*, but the defendants based their claim of a substantial right on their argument that the prior dismissal with prejudice gave rise to the defense of res judicata. This Court held that it was bound by *Allen*, but, in any event, explained that the fact defendants were specifically asserting the defense of res judicata did not entitle them to an interlocutory appeal because there was “no decision by any court or jury that could prove to be inconsistent with a future decision.” *Robinson*, 167 N.C. App. at 769, 606 S.E.2d at 453.

Like the defendants in *Robinson* and *Allen*, defendants in this case base their claim of res judicata on a prior voluntary dismissal

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with prejudice that does not reflect a ruling on the merits by any jury or judge. *Robinson* and *Allen* control and, therefore, we hold that defendants have failed to demonstrate the existence of a substantial right with respect to their appeal.

Defendants requested at oral argument before this Court that we nevertheless grant certiorari to review their contentions. An application for a writ of certiorari "shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner." N.C.R. App. P. 21(c). Defendants' request at oral argument falls short of the requirements of Rule 21. *See State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 321 (concluding footnote in appellate brief was insufficient to request writ of certiorari because it "clearly d[id] not meet the requirements set forth in Rule 21(c)"), *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005). Moreover, defendants have pointed to no circumstances that would justify the exercise of this Court's discretion to suspend the requirements of Rule 21 under N.C.R. App. P. 2. Defendants' appeal is, therefore, dismissed.

Summary Judgment as to Plaintiff Foster

We first consider plaintiffs' argument that the trial court erred by granting defendants summary judgment on all of Foster's claims. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)). This Court reviews orders granting summary judgment de novo. *Falk Integrated Techs., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999).

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A. Statutes of Repose and Limitations

[2] The trial court concluded that Foster's claims were barred under the four-year statute of repose applicable to medical malpractice actions. Although the statute of limitations applicable to medical malpractice actions is three years, the General Assembly has further provided that "in no event shall [a medical malpractice] action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . ." N.C. Gen. Stat. § 1-15(c) (2005). *See also Bowlin v. Duke Univ.*, 119 N.C. App. 178, 183, 457 S.E.2d 757, 760 (noting that "a medical malpractice cause of action must be filed within three years of the date of the last act giving rise to the cause of action" and that, in any event, there is "a period of repose of four years"), *disc. review denied*, 342 N.C. 190, 463 S.E.2d 233 (1995).

On appeal, plaintiffs assert that Foster's claims do not constitute a medical malpractice action, but, rather, are personal injury claims that enjoy a 10-year statute of repose and for which the statute of limitations did not begin to run until Foster was diagnosed with injuries as a result of Crandell's improper conduct. *See* N.C. Gen. Stat. § 1-52(16) (2005) ("[F]or personal injury . . . the cause of action . . . shall not accrue until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action."). We disagree.

A medical malpractice action is "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11 (2005). Here, Foster has asserted personal injury claims against Crandell that are premised entirely upon Crandell's negligent or reckless failure, as the supervising clinical psychiatrist, to adequately utilize his specialized knowledge and skill to supervise Rivest's counseling practices.

As these claims all implicate the furnishing of Crandell's professional services in a supervisory context, they are sufficient to establish that plaintiff Foster's claims are medical malpractice claims for purposes of the statute of limitations and the statute of repose. *Compare Mozingo v. Pitt County Mem'l Hosp., Inc.*, 101 N.C. App. 578, 588-89, 400 S.E.2d 747, 753 (physician subject to malpractice

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claim when he had supervisory responsibility over the physicians that actually provided plaintiffs with care), *disc. review denied*, 329 N.C. 498, 407 S.E.2d 537 (1991), *aff'd*, 331 N.C. 182, 415 S.E.2d 341 (1992), *with Taylor v. Vencor, Inc.*, 136 N.C. App. 528, 530, 525 S.E.2d 201, 203 (nursing home's failure to adequately supervise plaintiff's elderly mother while smoking cigarettes was not malpractice because such supervision did not require the furnishing of professional services), *disc. review denied*, 351 N.C. 646, 543 S.E.2d 889 (2000). The question remains, however, whether Foster has offered sufficient evidence that she asserted those claims in a timely fashion.

[3] It is undisputed that Crandell never treated Foster directly and that Foster bases her claims solely on his negligent supervision of Rivest. Consequently, in order to survive the motion for summary judgment based on the statutes of limitations and repose, Foster must point to evidence suggesting that Crandell continued to supervise Rivest after 27 December 1999—a date three years before plaintiffs filed their original complaint on 27 December 2002.

Borland's affidavit, submitted in opposition to summary judgment, states that Crandell advised her in February 2000 that she should "seek treatment elsewhere because *he did have an on-going supervisory relationship with Michael Rivest.*" (Emphasis added.) When this evidence is viewed in the light most favorable to Foster, the non-moving party, it is sufficient to raise an issue of fact as to whether Crandell's supervisory relationship with Rivest had continued into 2000. As a result, an issue of fact exists as to whether Foster's claims were filed within the three-year statute of limitations.

With respect to the longer four-year statute of repose, Rivest sent Bowen a letter on 13 July 1999—copied to Crandell—stating that Rivest had consulted with "our Medical Director and Clinical Supervisor regarding [her] case" and that Rivest and the Medical Director/Clinical Supervisor believed "that counseling at St. Matthew's Institute will not decrease [her] problems at this time." Crandell does not dispute that he was the Medical Director/Clinical Supervisor, but contends that this letter was merely an outdated "form letter" and any reference to Crandell should be disregarded. The fact that the letter was, in handwriting, specifically copied to Crandell runs counter to this argument. To accept defendants' contention would require that we construe the evidence in a light favorable to Crandell—an approach not permissible at the summary judgment stage.

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In addition, Bowen's affidavit also provides that on "a number of occasions" after July 1999, Crandell indicated to her that he was familiar with her situation "because he shared information with Michael Rivest due to his supervisory relationship over Rivest." Indeed, Foster's own affidavit states that in mid-1999, she saw Crandell interact with Rivest at church functions and "come over for meetings." Collectively, this evidence is sufficient to raise an issue of fact as to whether Crandell was supervising Rivest after 27 December 1998, four years prior to the date plaintiffs filed their original complaint.

Thus, Foster submitted sufficient evidence to raise issues of fact as to both the statute of limitations and the statute of repose. Accordingly, the trial court's award of summary judgment to defendants on Foster's claims on statutes of limitations or repose grounds was in error.

B. Alternative Grounds for Upholding the Judgment

[4] Defendants nevertheless argue that, even if the trial court erred by concluding Foster's claims were time-barred, defendants were entitled to summary judgment as to Foster's claims for intentional infliction of emotional distress ("IIED"), NIED, negligent supervision by Crandell, and negligent supervision by PsiMed. If, as here, an appellee is not otherwise entitled to bring an appeal, the "appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the . . . order . . . from which appeal has been taken." N.C.R. App. P. 10(d). Defendants have properly cross-assigned error to the Partial Summary Judgment Order's failure to award them summary judgment on Foster's claims on grounds other than the statutes of limitations and repose. We, therefore, consider whether Foster has presented sufficient evidence on the merits of her claims to defeat summary judgment.²

"The essential elements of intentional infliction of emotional distress are '(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress[.]'" *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4, 7 (alteration original) (quoting *Dickens v. Puryear*, 302 N.C. 437, 452, 276

2. We note that although Foster sued both PsiMed and Crandell, Foster makes no argument on appeal as to why summary judgment was improper as to PsiMed. Accordingly, Foster has abandoned her claims against PsiMed.

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S.E.2d 325, 335 (1981)), *appeal dismissed*, 353 N.C. 525, 549 S.E.2d 216, *disc. review improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001). We hold that Foster has failed to present sufficient evidence of the first element.

The question before us is not whether Rivest's improper sexual conduct constitutes "extreme and outrageous" behavior, but rather whether evidence of a failure by Crandell to properly supervise Rivest meets that test. "Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872 (2005) (quoting *Guthrie v. Conroy*, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408-09 (2002)), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 620 (2006). The determination whether conduct rises to the level of extreme and outrageous behavior is a question of law. *Id.*, 618 S.E.2d at 872-73.

Foster argues "that Crandell's willful failure to disclose critical information from the NC LPC Board constituted extreme and outrageous conduct." She does not suggest that Crandell failed to disclose any information of sexual misconduct by Rivest, but rather rests her argument on the failure to disclose the Board's demand that Rivest cease the practice of counseling. Foster cites no authority—and we have found none—supporting her contention that a failure to disclose information under the circumstances of this case "exceeds all bounds of decency tolerated by society . . ." *West v. King's Dep't Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). Compare *Burgess*, 142 N.C. App. at 400, 544 S.E.2d at 8 (holding that plaintiffs had sufficiently alleged a claim for IIED when defendant sent a letter to every physician having hospital admitting privileges in the county, including plaintiffs' primary care physicians, listing names and addresses of plaintiffs, who were jurors that rendered a verdict against him). Accordingly, defendants were entitled to summary judgment on Foster's IIED claim, and this portion of the Partial Summary Judgment Order is affirmed.

[5] An action for NIED has three elements: (1) defendant engaged in negligent conduct; (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress; and (3) defendant's conduct, in fact, caused plaintiff severe emotional distress. *Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A.*, 327

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N.C. 283, 304, 395 S.E.2d 85, 97 (1990). In order to meet the requirements of the first element, a plaintiff must establish that the defendant breached a duty of care owed to the plaintiff. *Guthrie*, 152 N.C. App. at 25, 567 S.E.2d at 411. Defendants do not contend that Foster has failed to present sufficient evidence of negligence,³ but instead argue only that Foster presented no evidence of foreseeability of severe emotional distress or that Crandell's conduct in fact caused her severe emotional distress.

With respect to the foreseeability element, Foster must have presented evidence indicating that her "emotional distress was a reasonably foreseeable result of [Crandell's] negligent acts." *Robblee v. Budd Servs. Inc.*, 136 N.C. App. 793, 797, 525 S.E.2d 847, 850, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000). Defendants argue that "Foster has offered no evidence or explanation as to how defendant Crandell's alleged negligent supervision caused her serious emotional distress" because Crandell did not review her records or have any professional relationship with her and because Crandell concluded his supervision of Rivest in November 1998.

This analysis, however, views the evidence in a light most favorable to defendants. As set out above, the record contains evidence that would allow a jury to find that Crandell's supervisory relationship continued into at least 2000. Further, plaintiffs submitted an affidavit by James F. T. Corcoran, M.D., in which he stated:

Assuming Crandell continued to supervise Rivest after December 3, 1998, my opinion is that Dr. Crandell breached his standard of care with regard to Freida Foster, not only because Rivest was not qualified to treat Foster, but also because he knew that the LPC board had ordered Rivest to cease and desist the practice of counseling. I am aware that Crandell was responsible for reviewing Rivest's counseling records based upon the information Crandell provided to the NCBLPC. If Crandell properly reviewed Rivest's counseling notes as he was required, he knew or should have known Rivest's clients, including Freida Foster. Therefore, he had a duty to advise her of Rivest's standing with the LPC board. If Crandell did not review Rivest's counseling records as was required by the NCBLPC, he breached the standard of care as it pertains to treatment and supervision.

3. See *Mozingo*, 331 N.C. at 190-91, 415 S.E.2d at 346 (doctor who assumed responsibility for supervising resident physicians owed duty of reasonable care to patients who were actually cared for by residents).

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Corcoran added: "It is my further opinion that the plaintiffs' emotional trauma was exacerbated by the treatment that they received from Michael Rivest as well as Dr. Crandell. Crandell placed Rivest in a position to harm others, and Rivest in fact, did harm the plaintiffs." This testimony explains how Crandell's conduct caused Foster's emotional distress and—together with plaintiffs' other summary judgment evidence—is sufficient evidence to raise a genuine issue of material fact as to whether it was reasonably foreseeable that if Crandell negligently failed to supervise Rivest, severe emotional distress could result in Rivest's clients, including Foster.

Regarding the third element, our courts have defined "severe emotional distress" to "mean[] any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Ruark Obstetrics*, 327 N.C. at 304, 395 S.E.2d at 97. Put more succinctly, a plaintiff must "present[] evidence . . . of diagnosable mental health conditions." *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 274, 542 S.E.2d 346, 352, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001). Here, Foster offered evidence from both her therapist and Dr. Corcoran that she suffered diagnosable mental health conditions as a result of Crandell's alleged negligence. Under *Ruark Obstetrics* and *Fox-Kirk*, this evidence is sufficient to give rise to a genuine issue of material fact as to whether Foster suffered severe emotional distress as a result of Crandell's conduct.

Defendants were not, therefore, entitled to summary judgment with respect to the merits of Foster's claim for NIED. Accordingly, we reverse the trial court's grant of partial summary judgment to defendant Crandell on Foster's NIED claim.

[6] Finally, Foster contends that she offered sufficient evidence to make out a *prima facie* case of negligent supervision. With respect to this cause of action, Foster does not rely upon the theory recognized in *Mozingo*, 331 N.C. at 190-91, 415 S.E.2d at 346, but rather bases her claim on *Medlin v. Bass*, 327 N.C. 587, 590-91, 398 S.E.2d 460, 462 (1990) (omissions original) (internal quotation marks and emphasis omitted) (quoting *Walters v. Durham Lumber Co.*, 163 N.C. 536, 541, 80 S.E. 49, 51 (1913)):

North Carolina recognizes a claim for negligent employment or retention when the plaintiff proves:

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“(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision, . . . ; and (4) that the injury complained of resulted from the incompetency proved.”

We cannot see how the *Medlin* theory of liability—a basis for imposing liability upon an employer for negligently hiring or retaining an employee—applies in this case.

The record contains no evidence that Crandell employed Rivest either as an employee or independent contractor. *See Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (“[I]n certain limited situations an employer may be held liable for the negligence of its independent contractor. Such a claim is not based upon vicarious liability, but rather is a direct claim against the employer based upon the actionable negligence of the employer in negligently hiring a third party.”), *aff’d per curiam*, 360 N.C. 164, 622 S.E.2d 494 (2005). At most, Crandell was, at one point, a co-employee of Rivest. Consequently, there can be no argument that Crandell negligently employed or retained Rivest.

Although it might be tempting to analyze Foster’s claims under *Mozingo*, a case not relied upon by Foster, our Supreme Court has recently reminded this Court that “[i]t is not the role of the appellate courts . . . to create an appeal for an appellant” by addressing an issue not raised or argued by the appellant. *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). To do otherwise would leave an appellee “without notice of the basis upon which an appellate court might rule.” *Id.* Because *Medlin* is inapplicable under these facts and Foster has presented no other legal basis for her negligent supervision claim, we hold that summary judgment was properly entered on this claim.

In sum, we reverse the trial court’s determination that Foster’s claims are barred by the statutes of limitations or repose. We agree with Crandell, however, that Foster has presented insufficient evidence to support her claims for IIED and negligent supervision. We disagree, however, with respect to Foster’s claim for NIED and, therefore, reverse the entry of summary judgment on that cause of action.

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Punitive Damages

[7] All three plaintiffs argue that the trial court erred when it granted defendants summary judgment as to plaintiffs' claims for punitive damages. Under N.C. Gen. Stat. § 1D-15(a), punitive damages may be awarded only when a claimant proves that a defendant is liable for compensatory damages and that one of three "aggravating factors"—fraud, malice, or willful or wanton conduct—was both present and related to the injury for which compensatory damages were awarded. Our General Assembly has defined "malice" as "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." N.C. Gen. Stat. § 1D-5(5) (2005). "Willful or wanton conduct," in turn, "means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7). More specifically, it "means more than gross negligence." *Id.* The claimant must prove the existence of the aggravating factor by clear and convincing evidence. N.C. Gen. Stat. § 1D-15(b).

Further, "[p]unitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another." N.C. Gen. Stat. § 1D-15(c). Instead, "[p]unitive damages may be awarded against a person only if that person participated in the conduct . . . giving rise to the punitive damages . . ." *Id.* As a result, Rivest's behavior—including any sexual misconduct—cannot serve as a basis for plaintiffs to obtain punitive damages from Crandell.

[8] Here, plaintiffs do not contend that either fraud or malice exists, but rather rely upon the "willful or wanton conduct" aggravating factor. In support of their claim for punitive damages, plaintiffs argue only that (1) "since they alleged a claim of intentional infliction of emotional distress, those allegations are sufficient to support a claim for punitive damages," and (2) "Crandell's conduct as it pertained to his reckless supervision of Rivest evidences a disregard and indifference to the rights and safety of others."

Since we have held that summary judgment was properly granted as to Foster's claims for IIED and negligent supervision, Foster has, on appeal, made no argument that would support her claim for punitive damages. We therefore hold the trial court properly entered summary judgment on Foster's claim for punitive damages.

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With respect to Borland's and Bowen's IIED claims, we note that plaintiffs rely only upon their "allegations" of IIED. In opposing a motion for summary judgment, however, the non-moving party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." N.C.R. Civ. P. 56(e). Accordingly, the issue is whether plaintiffs were able to "produce a forecast of evidence demonstrating that [they] will be able to make out at least a *prima facie* case at trial." *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Plaintiffs Borland and Bowen have not, however, made any argument on appeal as to what evidence supports their claim for IIED. Although evidence supportive of such a claim has been held sufficient to establish the necessary aggravating factor for a claim for punitive damages, *Watson v. Dixon*, 132 N.C. App. 329, 334, 511 S.E.2d 37, 41, *disc. review denied*, 351 N.C. 191, 541 S.E.2d 727 (1999), *aff'd*, 352 N.C. 343, 532 S.E.2d 175 (2000), plaintiffs' reliance upon mere allegations regarding their IIED claim rather than on evidence of that claim—including clear and convincing evidence of willful or wanton conduct—precludes us from reversing the trial court's determination that summary judgment was appropriate as to their punitive damages claim. It is not the responsibility of this Court to construct arguments for a party.

With respect to plaintiffs' "reckless supervision" claim, plaintiffs again cite to no particular evidence, but rather assert in conclusory fashion that "Crandell's conduct as it pertained to his reckless supervision of Rivest evidences a disregard and indifference to the rights and safety of others. This behavior falls within the scope of willful and wanton conduct." As this Court has previously held, "the mere characterization by [plaintiffs] of defendants' negligence as conscious and reckless [does] not create a genuine issue of material fact." *Lashlee v. White Consol. Indus., Inc.*, 144 N.C. App. 684, 694, 548 S.E.2d 821, 828, *disc. review denied*, 354 N.C. 574, 559 S.E.2d 179 (2001).

While plaintiffs have set out in the statement of facts the evidence that they contend supports their claim for negligent supervision and negligence in Crandell's professional treatment of Borland and Bowen, plaintiffs have not explained how that evidence rises above negligence—or even gross negligence—to reach the level of "conscious and intentional disregard of and indifference to the rights and safety of others." N.C. Gen. Stat. § 1D-5(7). Further, plaintiffs have

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cited no authority supporting their conclusory claim that their evidence is sufficient to meet the requirements for willful or wanton conduct. *See* N.C.R. App. 28(b)(6) (“Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”). We, therefore, cannot conclude that the trial court erred in entering summary judgment for defendants as to plaintiffs’ claim for punitive damages.

Conclusion

We dismiss defendants’ appeal and plaintiffs Bowen’s and Borland’s appeal as to the rulings on Mr. Henry’s testimony and their arguments regarding medicine management as interlocutory. We affirm the trial court’s entry of summary judgment as to all of Foster’s claims except for her claim for NIED against defendant Crandell. As to Foster’s NIED claim against defendant Crandell, we reverse. We affirm the entry of summary judgment as to all plaintiffs’ claims for punitive damages.

Affirmed in part; reversed in part; dismissed in part.

Judges WYNN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

IN THE MATTER OF: L.B., A MINOR CHILD

No. COA06-483

(Filed 2 January 2007)

1. Appeal and Error— appellate rules violations—motion to deem brief timely served—motion to dismiss brief—denial of sanctions

The guardian ad litem’s (GAL) motion to deem appellee GAL’s brief timely served is allowed, and respondent mother’s motion to dismiss GAL’s brief on N.C. R. App. P. 13 grounds is denied, because: (1) this case deals with guardianship of a juvenile; and (2) respondent did not allege that she suffered any prejudice from the minimal delay in being served with the GAL’s brief.

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2. Appeal and Error— notice of appearance of counsel— appellate counsel

The guardian ad litem's (GAL) attorney is properly appearing in a juvenile guardianship case because while there is no order in the record naming the GAL's current counsel as appellate counsel, both respondent and the GAL agree that a notice of appearance of counsel was filed at the Court of Appeals.

3. Appeal and Error— appellate rules violations—statement of facts

Respondent mother's motion to dismiss the guardian ad litem's (GAL) brief and motion to strike portions of GAL's brief on N.C. R. App. P. 28 grounds in a juvenile guardianship case is denied even though respondent contends the statement of facts includes information not found by the trial court and allegedly contains misrepresentations regarding the underlying facts of the case, because: (1) the rule does not limit a party's ability to make reference to facts supported by the evidence but not specifically found by the trial court to be able to provide the Court of Appeals with a thorough picture of the circumstances and events that led to appeal; (2) respondent cites no authority, and none was found, which limited a party's statement of facts to those found by the trial court; and (3) the GAL's statement of facts was supported by both the transcript and record on appeal.

4. Appeal and Error— appellate rules violations—denial of sanctions

Respondent mother's motion to dismiss and strike petitioner appellee DSS's brief on N.C. R. App. P. 13 grounds is denied, because: (1) this case deals with juvenile guardianship; and (2) respondent did not allege that she suffered any prejudice from the delay in being served with DSS's brief.

5. Appeal and Error— appellate rules violations—affidavit stricken—matters in brief outside record

The portions of DSS's brief that provides and cites to an affidavit not included in the record on appeal in a juvenile guardianship case is stricken, because: (1) N.C. R. App. P. 9 provides that matters discussed in the brief outside the record are not properly considered on appeal since the record imports verity and binds the reviewing court; and (2) contrary to DSS's assertion that it would have to provide documents omitted from the settled record, N.C. R. App. P. 28(d)(3)(a) only addresses in-

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formation from a transcript that must be included in an appendix, there is no reference in the rule to information omitted from the record, and DSS's argument was unsupported by any rule of appellate procedure.

6. Child Abuse and Neglect— permanency planning order— subject matter jurisdiction

The trial court had authority to enter its permanency planning order in a juvenile guardianship case even though the non-secure custody order and summons were issued before the juvenile petition was signed and verified, because: (1) the juvenile petition was eventually signed and verified by a DSS representative; and (2) once this occurred on 19 August 2004, the trial court gained subject matter jurisdiction and could properly act on this matter from that day forward.

7. Child Abuse and Neglect— permanency planning hearing— failure to conduct hearing within twelve months of original custody order

The trial court did not commit reversible error in a juvenile guardianship case by failing to conduct the permanency planning hearing within twelve months of the date of the original custody order, because: (1) an appellant must prove prejudice to warrant reversal for a violation of N.C.G.S. § 7B-907(e) which governs time lines for filing petitions to terminate parental rights, and the Court of Appeals concluded the same must be proven for N.C.G.S. § 7B-907(a) which is applicable in the instant case; (2) had the permanency planning hearing been held in August when respondent contends it should have been held, respondent's living situation would have been less stable since the hearing would have occurred during respondent's transition from her old home to her new one, and further respondent never testified that she had room or space for the pertinent minor in her new home; (3) although more recent evidence was presented at the hearing, the trial court made no findings regarding the minor's half-siblings' alleged change in their position on their permanent placement, and there was no evidence presented that the GAL or DSS changed their recommendation on the minor's placement based on anything that occurred after the twelve-month time frame had expired; and (4) while the court included a finding that respondent had prematurely left a scheduled visit with the juveniles three weeks before the hearing, absent this finding, there remained ample evidence to support the trial court's determination.

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8. Child Abuse and Neglect— permanency planning order— sufficiency of findings of fact

The trial court did not err in a juvenile guardianship case by allegedly failing to make sufficient findings of fact to support its permanency planning order as required by N.C.G.S. § 7B-907(b), because: (1) this section of the juvenile code does not require a permanency planning order to contain a formal listing of the N.C.G.S. § 7B-907(b)(1)-(6) factors as long as the trial court makes findings of fact on the relevant § 7B-907(b) factors; (2) the trial court considered all the relevant § 7B-907(b) criteria and made appropriate findings in its order; and (3) with respect to respondent's argument that the trial court did not make any findings under § 7B-907(b)(5), there was no permanent plan with which DSS had to comply since this was the initial permanency planning hearing.

9. Child Abuse and Neglect— permanency planning order— visitation

The trial court erred in a juvenile guardianship case by determining in its permanency planning order that visitation between the juvenile and the mother shall be supervised by the custodians and shall be in the discretion of the custodians but shall not be unreasonably prevented, and the case is remanded to the trial court to issue a new order on visitation, because: (1) the exercise of this judicial function may not be delegated by the court to the custodian of the child; and (2) when the discretion to provide visitation is granted to the custodian of a child, it may result in a complete denial of the right.

10. Child Abuse and Neglect— permanency planning order— considering and incorporating reports and summaries as finding of fact

The trial court did not err in a juvenile guardianship case by considering and incorporating reports and summaries from DSS and from the GAL as findings of fact in its permanency planning order, because: (1) when conducting a juvenile proceeding, the trial court is permitted to consider all materials including written reports that have been submitted in connection with the proceeding, although the trial court may not delegate its fact finding duty; and (2) the trial court properly incorporated DSS and GAL reports, properly made findings of fact included in the order based on these reports, these findings are sufficient

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to support the trial court's ultimate determination, and there was no evidence the trial court relied on information from the reports that it then failed to include as a finding of fact in its order.

11. Child Abuse and Neglect— permanency planning order— failure to comply with previous court orders—keep mother's boyfriend away from minor

The trial court did not err in a juvenile guardianship case by relying on prior court orders, DSS reports, and GAL reports to find that respondent mother has not complied with previous orders of the court to keep the minor away from respondent's boyfriend who was a sex offender from another state and living with the mother, because: (1) although respondent correctly asserts that no new evidence was presented at the hearing regarding her current relationship with her boyfriend and his presence around the minor, the finding merely indicated that respondent had not previously complied with court orders requiring her to eliminate contact between her boyfriend and the minor, thus recognizing that respondent placed the importance of her relationship with her boyfriend above the welfare of her child; and (2) even if the trial court included this finding in error, there remained sufficient evidence through court documents in the record and by testimony at the hearing to support the trial court's ultimate determination that the permanent plan for the minor should be a change of custody to the grandparents of the minor's half siblings.

12. Child Abuse and Neglect— permanency planning order— psychological evaluation

The trial court did not abuse its discretion in a juvenile guardianship case by ordering respondent mother to undergo a psychological evaluation and by finding that she had not previously complied with the trial court's order directing such an evaluation because of: (1) the serious nature of the allegations, respondent's concession that her daughter was neglected, and the Court of Appeals' holding in *In re Cogdill*, 137 N.C. App. 504 (2000); and (2) respondent's own testimony that she failed to comply with the court's previous order that she undergo a psychological or psychiatric evaluation and comply with the recommendations of the evaluator.

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Appeal by Respondent-mother from permanency planning order filed 23 November 2005 by Judge R. Les Turner in Wayne County District Court. Heard in the Court of Appeals 19 October 2006.

Jeffrey L. Miller for Respondent-Appellant.

E.B. Borden Parker for Petitioner-Appellee.

Amanda A. Volz for Guardian ad Litem-Appellee.

STEPHENS, Judge.

Respondent-Appellant (“Respondent”) is the mother of L.B., the juvenile who is the subject of this appeal.¹ By a nonsecure custody order dated 17 August 2004, L.B. was taken into physical custody by the Wayne County Department of Social Services (“DSS”). The non-secure custody order was based on a juvenile petition, signed and verified on 19 August 2004, alleging that L.B. was neglected in that she “lives in an environment injurious to [her] welfare[,]” and dependent in that her “parent, guardian, or custodian is unable to provide for [her] care or supervision and lacks an appropriate alternative child care arrangement.” In particular, the petition alleged, *inter alia*, that

there was a sexual offender . . . living in the home and mother lied to law enforcement to protect him. . . . During the time of DSS investigation it was learned that L.B. was being medicated by the mother with the mother’s medication. After the child was seen and prescribed her [own] medication mother was using L.B.’s medication as well as her own to double medicate the child. DSS has confirmed that Josh Ryan a known sex offender from Illinois has been residing in the home. According to what DSS has learned L.B. has had emotional problems since Josh has been involved with the mother. . . . L.B. indicated that she feels uncomfortable in the presence of Josh and is afraid of how he will react. L.B. states that Josh has sung sexually explicit songs in her presence and made statements to her such as “he is tired of being a screw buddy with her mother.”

L.B. currently lives with Steven and Doris Johnson, R.B.’s paternal grandfather and paternal step-grandmother, with whom she was placed in custody by order filed 23 December 2004. On 27 October

1. Respondent is also the mother of two additional juveniles, R.B. and A.M., who are the subject of an appeal in COA06-484. Although the appeals regarding L.B. and her siblings were filed separately, there was only one hearing at the trial court that resolved the issues for all three juveniles.

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2005, a permanency planning hearing was held before the Honorable R. Les Turner in Wayne County District Court. At that hearing, the evidence tended to show the following:

Tammy Oxendine, a foster care social worker for DSS, testified that during a previous hearing, on 8 August 2005, Respondent provided DSS with her alleged home address and a telephone number for her employer. However, when Ms. Oxendine attempted to verify this information, she learned that Respondent did not live at the address she provided, and that her employer's phone had been disconnected. Ms. Oxendine testified further that she had had contact with Respondent since the 8 August 2005 hearing, but Respondent never informed her that her address had changed or that her employer's phone had been disconnected.

Respondent testified that she had provided DSS her current address and that she has received mail from DSS at her current residence. She also indicated that she provided DSS with her telephone contact numbers, including a number for a cellular phone. Her new residence, in which she has lived for four months, has three bedrooms, a living room, a kitchen, and a bathroom. It is a wood and brick structure and she lives in the home with her father, when he is in Wayne County. Respondent testified that R.B. and A.M. each would have their own bedroom in the house, but Respondent omitted any reference to a bedroom in the house for L.B. Respondent testified further that she works at a laundry business called the Laundry Room, and that Ms. Oxendine could not locate the business because it is in the process of relocating to Wilson County. Although the Laundry Room is changing locations, Respondent's continued employment has been confirmed by her employer. Overall, Respondent feels that she is able to care for her children.

With regard to visitation the testimony indicated that, during a supervised visit three weeks earlier, Respondent left before the visit could begin because, according to Respondent, "Mrs. Johnson would not let her have any contact with the children and . . . was embarrassing her in front of other people at the park[.]" During her testimony, Ms. Oxendine explained that Mrs. Johnson would not allow the children to visit with Respondent because the court had required supervised visitation and a DSS worker had yet to arrive. More generally, Ms. Oxendine indicated that "[s]ome of the visits have gone very well[.]" however, there have also been occasions when L.B. has not participated. At times, L.B. has informed Ms. Oxendine that she does not want to attend and, at other times, has attended but has not

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interacted with Respondent. During her last two visits, L.B. has informed Ms. Oxendine that she desired to be with the Johnsons. L.B. seems bonded with the Johnsons and seems to be happy to have some stability in her life. Respondent testified that she has had sporadic visits with her children, and that her phone contact with her children has been reduced over time.

By previous court order, Respondent was required to complete individual therapy, attend anger management, complete a psychological evaluation, maintain stable housing, and maintain employment. By the time of the hearing, she had completed most requirements, but had failed to complete a psychological evaluation. Ms. Oxendine testified that she was recommending guardianship of the children, rather than reunification with Respondent, because Respondent had not completed a psychological evaluation and because she could not determine whether Respondent's housing situation was stable or whether she was employed.

With regard to the psychological evaluations, Respondent testified that, although her evaluator had difficulty acquiring information from DSS, she took a psychological test but the evaluator informed her that "it wouldn't be in [her] best interest for him to submit anything." Since then, Respondent has made an appointment for a psychological evaluation with another service provider, called Eastpointe, but the woman with whom she made the appointment subsequently went on maternity leave. Respondent has taken no further action to comply with the court orders on this issue since March or April 2005.

Ms. Oxendine testified further that the agency was recommending guardianship of L.B. with the Johnsons and that although they are not "blood relatives" to all of the children, they do not treat L.B. or A.M. differently than they treat R.B. At the end of the hearing, Judge Turner entered a permanency planning order in which he determined that the permanent plan regarding L.B. would change from reunification with Respondent to guardianship with the Johnsons. From this order, Respondent appeals. We affirm the order in part, vacate the order in part, and remand the case to the trial court.

As a preliminary matter, we must address motions filed by guardian *ad litem*-Appellee and Respondent. On 26 June 2006, Respondent filed her "Motion to Dismiss Guardian's Brief; Motion to Strike Portions of Guardian's Brief" and, on the same day, the

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guardian *ad litem* filed a “Motion to Deem Appellee GAL’s Brief Timely Served[.]” In support of her motion, the guardian *ad litem* explained that her misinterpretation of the Rules of Appellate Procedure led to her failure to timely serve her brief upon Respondent as required by rule. Respondent argues that the guardian *ad litem*’s brief should be dismissed or stricken in part because (1) she was not timely served with the guardian *ad litem*’s brief, (2) there has been no order appointing the guardian *ad litem*’s attorney to appear as counsel, and (3) the guardian *ad litem*’s brief contains an improper statement of facts.

[1] First, we address the guardian *ad litem*’s failure to timely serve her appellate brief on Respondent. Under Rule 13 of the North Carolina Rules of Appellate Procedure,

(a)

(1) [w]ithin 30 days after appellant’s brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

. . . .

(c) If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

N.C. R. App. P. 13(a)(1); 13(c). In this case, Respondent’s brief was served on the guardian *ad litem*, by mail, on 10 May 2006. Rule 27 of the North Carolina Rules of Appellate Procedure provides that “[w]henever a party has the right to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.” N.C. R. App. P. 27(b). Therefore, under Rule 13 and Rule 27, the guardian *ad litem* was required to serve her brief on Respondent by 12 June 2006. The guardian *ad litem*’s brief was timely filed in this Court, but was not served on Respondent until 26 June 2006, in clear violation of Rule 13, thus subjecting the guardian *ad litem*-appellee to appropriate sanctions. As this case, pursuant to Rule 30(f), was not scheduled for oral argument, the appropriate sanction under Rule 13 (disallowing oral argument of appellee whose brief is not timely filed and served) is not applicable. Therefore, we may only impose sanctions, including striking the brief, under Rule 25 and Rule 34.

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This Court does not treat every violation of the Rules of Appellate Procedure with a blunt instrument that eviscerates the work of an offending attorney, and potentially harms an innocent party. Rather, we examine violations of the Rules with a cautious eye and with the objective of promoting justice. Since this case deals with guardianship of a juvenile and because Respondent did not allege that she suffered any prejudice from the minimal delay in being served with the guardian *ad litem*'s brief, we choose not to impose sanctions upon the guardian *ad litem*'s counsel, although we urge her to heed the Rules of Appellate Procedure. Therefore, the guardian *ad litem*'s "Motion to Deem Appellee GAL's Brief Timely Served" is allowed, and Respondent's "Motion to Dismiss Guardian's Brief[,] on Rule 13 grounds, is denied.

[2] Next, Respondent argues that because there has been no order appointing this particular attorney to appear as appellate counsel for the guardian *ad litem*, her brief should be dismissed. Under the North Carolina Juvenile Code,

[w]hen in a petition a juvenile is alleged to be abused or neglected, the court shall appoint a guardian *ad litem* to represent the juvenile. When a juvenile is alleged to be dependent, the court may appoint a guardian *ad litem* to represent the juvenile. . . . The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court. . . . In every case where a nonattorney is appointed as a guardian *ad litem*, an attorney shall be appointed in the case in order to assure protection of the juvenile's legal rights throughout the proceeding.

N.C. Gen. Stat. § 7B-601(a) (2003). In this case, by order dated 30 August 2004, Tim Finan was named the attorney advocate for the juvenile. While there is no order in the record naming the guardian *ad litem*'s current counsel as appellate counsel, both Respondent and the guardian *ad litem* agree that a "Notice of Appearance of Counsel" was filed at this Court. Therefore, the guardian *ad litem*'s attorney is properly appearing in this case, and Respondent's motion to dismiss the guardian *ad litem*'s brief on this basis is likewise denied.

[3] Finally, Respondent argues that the guardian *ad litem*'s brief should be dismissed or stricken in part because the statement of facts includes information not found by the trial court and contains misrepresentations regarding the underlying facts of this case.

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The North Carolina Rules of Appellate Procedure require the statement of facts included in an appellate brief to contain

[a] full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

N.C. R. App. P. 28(b)(5). Plainly read, this Rule does not limit a party's ability to make reference to facts, supported by the evidence but not specifically found by the trial court, to be able to provide this Court with a thorough picture of the circumstances and events that led to the appeal. Additionally, Respondent cites no authority, and our research reveals none, which limits a party's statement of facts to those found by the trial court. Because the guardian *ad litem*'s statement of facts is supported by both the transcript and Record on Appeal, we believe that the brief conforms to the guidelines established by Rule 28. Accordingly, Respondent's "Motion to Dismiss Guardian's Brief; Motion to Strike Portions of Guardian's Brief[,] on Rule 28 grounds, is also denied.

[4] On 23 August 2006, Respondent also filed a "Motion to Dismiss and Strike Petitioner-Appellee DSS' [sic] Brief[.]". In support of this motion, Respondent contends that because the brief submitted by DSS "was not timely filed or served, and no extension of time for filing was granted by the Court of Appeals[,"] the brief should be stricken and dismissed. We are not persuaded to take this drastic action.

Respondent's brief was served on DSS, by mail, on 10 May 2006. Therefore, under Rule 13 and Rule 27, DSS was required to serve its brief on Respondent by 12 June 2006. However, DSS's brief was not filed in this Court until 3 July 2006 and was not served on Respondent until 30 June 2006, in clear violation of Rule 13, thus subjecting DSS to appropriate sanctions. Once again, however, as this case was not scheduled for oral argument, the appropriate sanction under Rule 13 is not applicable. Therefore, we may only impose sanctions, including striking the brief, under Rule 25 and Rule 34.

While this Court takes violations of the appellate rules very seriously, because this case deals with guardianship of a juvenile and because Respondent did not allege that she suffered any prejudice

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from the delay in being served with DSS's brief, we choose not to impose sanctions upon DSS's counsel. However, we caution DSS's attorney that the proper approach would have been to move the Court for an extension of time in which to file and serve the brief or, alternatively, to move the Court to deem the brief timely filed and served. Respondent's "Motion to Dismiss and Strike Petitioner-Appellee DSS' [sic] Brief[,] on Rule 13 grounds, is denied.

[5] In the same motion, Respondent argues that because DSS provides and cites to an affidavit not included in the Record on Appeal, DSS's brief should be dismissed or stricken in part. We agree.

Rule 9 of the North Carolina Rules of Appellate Procedure states:

In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite to any of these items in their briefs and arguments before the appellate courts.

N.C. R. App. P. 9(a). "Matters discussed in the brief outside the Record are not properly considered on appeal since the Record imports verity and binds the reviewing court." *In re Norris*, 65 N.C. App. 269, 274, 310 S.E.2d 25, 28 (1983) (citing *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976)), cert. denied, 310 N.C. 744, 315 S.E.2d 703 (1984).

In this case, at the end of its brief, DSS included as an exhibit an affidavit from Jennifer Watson, a DSS social worker. Additionally, DSS cited to this affidavit in its brief. As this affidavit was not included in the settled record, it was inappropriate, under Rule 9, for DSS to provide and then rely on this document. In its response to the motion, DSS directs our attention to Rule 28(d)(3)(a), arguing that because DSS would have been required to provide omitted portions of a transcript, it follows that DSS could provide documents omitted from the settled record. We find DSS's argument to be without merit. Rule 28(d)(3)(a) only addresses information from a transcript that must be included in an appendix; there is no reference in the rule to information omitted from the record. Moreover, we find DSS's argument unsupported by any rule of appellate procedure. Accordingly, we strike the included affidavit and all references made to the information contained in the affidavit from DSS's brief.

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[6] We turn our attention now to Respondent's appeal from Judge Turner's permanency planning order. Respondent first contends that the trial court was without subject matter jurisdiction to enter that order because the mandatory process for acquiring jurisdiction was not met. Specifically, Respondent argues that because the nonsecure custody order and summons were issued before the juvenile petition was signed and verified, the trial court lacked authority to enter the custody order.

Under North Carolina law, in juvenile proceedings, “[a]n action is commenced by the filing of a petition in the clerk’s office when that office is open or by the issuance of a juvenile petition by a magistrate when the clerk’s office is closed, which issuance shall constitute a filing.” N.C. Gen. Stat. § 7B-405 (2003). Further,

[a]ll reports concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the director of the department of social services for screening. Thereafter, if it is determined by the director that a report should be filed as a petition, the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

N.C. Gen. Stat. § 7B-403(a) (2003). In support of her argument that the failure of DSS personnel to sign and verify the juvenile petition until after the nonsecure order was filed renders the trial court’s subsequent orders invalid, Respondent directs our attention to *In re Green*, 67 N.C. App. 501, 313 S.E.2d 193 (1984). In *Green*, this Court determined that the trial court did not have subject matter jurisdiction because the juvenile petition was not signed and verified as required by the controlling statute of that time. *Id.* However, *Green* is readily distinguishable from the case that is currently before this Court. Unlike *Green*, where the petition was never signed and verified, in this case, on 19 August 2004, two days after the order for nonsecure custody was filed, the petition was signed and verified. Since *Green* is not directly on point, it does not control.

In *In re T.R.P.*, 173 N.C. App. 541, 546, 619 S.E.2d 525, 529 (2005), *aff’d*, 360 N.C. 588, 636 S.E.2d 787 (2006), this Court again vacated a juvenile order because “the Petition was neither signed nor verified by the director or an authorized representative of the director.” However, the *T.R.P.* Court left open the possibility that DSS could take remedial action which, in turn, could provide the trial court with subject matter jurisdiction. Specifically, the *T.R.P.* Court stated, “[a]s

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there is no evidence in the record *suggesting later filings sufficient to invoke jurisdiction* as to the review order, the trial court erred in proceeding on the matter due to lack of subject matter jurisdiction." *Id.* at 547, 619 S.E.2d at 529 (emphasis added).

The circumstance that the *Green* court foresaw exists here. In this case, the order for nonsecure custody was filed 17 August 2004 and summons was issued 18 August 2004. However, the juvenile petition was not signed and verified until 19 August 2004. Therefore, under N.C. Gen. Stat. § 7B-403, N.C. Gen. Stat. § 7B-405, *Green*, and *T.R.P.*, the trial court did not have jurisdiction when the order for non-secure custody was filed and summons was issued. Unlike both *Green* and *T.R.P.*, here the juvenile petition was eventually signed and verified by a DSS representative. Once this occurred on 19 August 2004, the trial court gained subject matter jurisdiction and could properly act on this matter from that day forward. Therefore, the trial court had authority to enter its permanency planning order. This assignment of error is overruled.

[7] Respondent next argues that the trial court committed reversible error by failing to conduct the permanency planning hearing within twelve months of the date of the original custody order, that is, in August, rather than October, 2005.

In North Carolina,

[i]n any case where custody is removed from a parent, guardian, custodian, or caretaker, the judge shall conduct a review hearing designated as a permanency planning hearing within 12 months after the date of the initial order removing custody[.]

N.C. Gen. Stat. § 7B-907(a) (2005). In *In re C.L.C.*, 171 N.C. App. 438, 443, 615 S.E.2d 704, 707 (2005) (citing *In re J.L.K.*, 165 N.C. App. 311, 598 S.E.2d 387, *disc. review denied*, 359 N.C. 68, 604 S.E.2d 314 (2004)), *aff'd and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006), this Court determined that "time limitations in the Juvenile Code are not jurisdictional . . . and do not require reversal of orders in the absence of a showing by the appellant of prejudice resulting from the time delay." More specifically, this Court has previously determined that an appellant must prove prejudice to warrant reversal for a violation of N.C. Gen. Stat. § 7B-907(e), which governs time lines for filing petitions to terminate parental rights. *In re As.L.G.*, 173 N.C. App. 551, 619 S.E.2d 561 (2005), *disc. review improvidently allowed*, 360 N.C. 476, 628

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S.E.2d 760 (2006). While the case currently before us involves a violation of N.C. Gen. Stat. § 7B-907(a), and not section 7B-907(e), we are persuaded by the rationale underlying the decision in *As.L.G.* and thus hold that, in order to warrant reversal of a trial court's permanency planning order for a violation of section 7B-907(a), an appellant must demonstrate prejudice.

Whether a party has adequately shown prejudice is always resolved on a case-by-case basis; however, determining prejudice is not a rubric by which this Court vacates or reverses an order when, in our opinion, the order is not in the child's best interest. Nor is prejudice, if clearly shown by a party, something to ignore solely because the remedy of reversal further exacerbates the delay.

Id. at 554, 619 S.E.2d at 564.

In her brief to this Court, Respondent alleges that because of the two-month delay in holding the permanency planning hearing, and because DSS did not make an adequate effort to evaluate her current living situation, she was prejudiced. In particular, Respondent argues that “[h]ad the hearing been held in a timely manner, [her] home properly could have been considered and in-home visits could have been scheduled and suitable assessments made before DSS and the GAL changed their recommendations about reunification as the permanent plan.” Additionally, Respondent contends that the trial judge relied on evidence gathered after the twelve-month time frame had expired to change the permanent plan. Specifically, Respondent asserts that (1) between the time the permanency planning review hearing should have been held and when it was actually held, her two younger children reversed their positions and decided that they did not want to live with Respondent, and (2) both DSS and the guardian *ad litem* changed their recommended plans from reunification of Respondent and her children to guardianship of the children with the Johnsons. We disagree that Respondent has thereby proved prejudice.

With regard to Respondent's current living situation, the evidence presented at the hearing indicated that Respondent's living arrangement had been steady for four months. Had the permanency planning hearing been held in August, as Respondent contends it should have been, Respondent's living situation would have been less stable because the hearing would have occurred during Respondent's transition from her old home to her new one. Additionally, although

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Respondent testified that she currently lives in a three-bedroom house and specifically mentioned having space for L.B.'s siblings, she did not testify that she has a room in the house dedicated for use by L.B. This is the testimony on which Judge Turner relied when he found that "in describing the home where she now lives, the mother stated that her father stayed with her when he is in Wayne County and that she had room for half-siblings of this juvenile. The mother did not mention having room or space for this juvenile [L.B.]". Therefore, Respondent's argument that the delay caused her prejudice in the trial court's evaluation of her domestic situation is without merit.

As for Respondent's assertion that the trial judge based his decision on evidence that arose after the twelve-month time period, we likewise perceive no prejudice. Although more recent evidence was presented at the hearing, the trial court made no findings regarding L.B.'s half-siblings' alleged change in their position on their permanent placement, and there was no evidence presented that the guardian *ad litem* or DSS changed their recommendation on L.B.'s placement based on anything that occurred after the twelve-month time frame had expired. While the court included a finding that Respondent had prematurely left a scheduled visit with the juveniles three weeks before the hearing, we believe that, absent this finding, there remained ample evidence to support the trial court's determination. Therefore, in this respect as well, Respondent has not adequately demonstrated prejudice.

[8] Respondent further argues that the trial court failed to make sufficient findings of fact to support its permanency planning order, as required by N.C. Gen. Stat. § 7B-907(b). Specifically, Respondent contends that the trial court erred by failing to make findings on: (1) why it was not in L.B.'s best interest to be returned home, (2) why guardianship with a relative or other suitable person should or should not be established, (3) whether L.B. should remain in her current placement or be placed elsewhere once the court determined that it was unlikely she would be returned home within six months, and (4) whether DSS made reasonable efforts to implement the permanent plan for L.B.

In permanency planning proceedings, North Carolina law requires the following:

At the conclusion of the hearing, if the juvenile is not returned home, the court shall consider the following criteria and make written findings regarding those that are relevant:

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- (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
- (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
- (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
- (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
- (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
- (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2005). In *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004), *overruled on other grounds by In re R.T.W.*, 359 N.C. 539, 614 S.E.2d 489 (2005), *superceded by statute as stated in In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006), this Court determined that this section of the Juvenile Code does not require a permanency planning order to contain a formal listing of the § 7B-907(b)(1)-(6) factors, "as long as the trial court makes findings of fact on the relevant § 7B-907(b) factors[.]" Based on our review of Judge Turner's permanency planning order, we believe that he considered all the relevant section 7B-907(b) criteria and made appropriate findings in his order regarding them. In his permanency planning order, Judge Turner made the following relevant findings of fact:

14. That the mother has been ordered to undergo a psychological evaluation but has not done so.
15. That the mother went to Dr. Scott Allen, but Dr. Allen did not complete the psychological evaluation although he adminis-

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tered some tests. The mother informed the Court that she had taken other tests. The mother called to make an appointment at Eastpointe for a psychological evaluation but . . . the person with whom she had an appointment was on maternity leave. The mother believes this was done in March or April of 2005, and she has not been contacted again by Eastpointe, nor has she contacted Eastpointe to see if the individual has returned from maternity leave or whether there is someone else that can conduct the evaluation.

-
19. That in describing the home where she now lives, the mother stated that her father stayed with her when he is in Wayne County and that she had room for half-siblings of this juvenile. The mother did not mention having room or space for this juvenile.

....

 26. That the juvenile has no interest in having visits with the mother at this time.

....

 29. That it does not appear to the Court that the mother has conquered her anger problems.

....

 32. That the juvenile is well bonded with the current custodians who are the grandparents of one of the half-siblings of this juvenile.
 33. That Steven and Doris Johnson are fit and proper persons to have the continued custody of the juvenile and to be designated as the guardian of the juvenile.
 34. That the petitioner recommends that the permanent plan for the juvenile be changed from reunification to placement and guardianship with Steven and Doris Johnson.

....

 36. That the Johnsons have added two bedrooms to their home to ensure that the juvenile and the half-siblings of the juvenile have a place with them.

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These findings are sufficient to meet the requirements under N.C. Gen. Stat. § 7B-907(b). Specifically, we hold that (1) the requirements under section 7B-907(b)(1) are met by findings of fact 14, 15, 19, 26, and 29; (2) the requirements under section 7B-907(b)(2) are met by findings of fact 32, 33, and 34; (3) the requirements under section 7B-907(b)(3) are implicitly met by findings of fact 32, 33, and 34; and (4) the requirements under section 7B-907(b)(4) are met by findings of fact 32, 33, 34, and 36.

With respect to Respondent's argument that the trial court erred by not making any findings under N.C. Gen. Stat. § 7B-907(b)(5), we hold that because this was the initial permanency planning hearing, there was no permanent plan with which DSS had to comply. Respondent's arguments regarding the sufficiency of the trial court's findings are without merit.

[9] However, Respondent additionally argues that the trial court erred in the visitation decision it made, by determining “[t]hat visitation between the juvenile and the mother shall be supervised by the custodians and shall be in the discretion of the custodians, but shall not be unreasonably prevented.” We agree and therefore remand this case to the trial court to amend the order.

In *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971), this Court held that “when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child.” The rationale underlying this decision is that when the discretion to provide visitation is granted to the custodian of a child, it may “result in a complete denial of the right[.]” *Id.* Based on the direction provided by this Court in *Stancil*, we hold that the trial court erred by leaving visitation within the discretion of the Johnsons. We thus vacate that portion of the court’s permanency planning order and remand this case to the trial court to issue a new order on visitation between Respondent and L.B. consistent with this opinion and the *Stancil* holding.

[10] By her next argument, Respondent contends that the trial court erred by considering and incorporating reports and summaries from DSS and from the guardian *ad litem* as a finding of fact in its order. Respondent argues that the trial court included findings from DSS reports that “were patently incorrect because each DSS report was simply a template copy restating information from past reports[,]”

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and that “the actual findings stated by the Court without the incorporate[ed] finding[s] are insufficient under 7B-907 to cease reunification efforts and to establish guardianship.” We find this argument without merit.

In North Carolina,

[a]t any permanency planning review, the court shall consider information from the parent, the juvenile, the guardian, any foster parent, relative, or preadoptive parent providing care for the child, the custodian or agency with custody, the guardian *ad litem*, and any other person or agency which will aid it in the court’s review.

N.C. Gen. Stat. § 7B-907(b) (2005). When conducting a juvenile proceeding, the trial court is permitted to consider all materials, including written reports, that have been submitted in connection with the proceeding. *In re J.S.*, 165 N.C. App. 509, 598 S.E.2d 658 (2004). However, “the trial court may not delegate its fact finding duty.” *Id.* at 511, 598 S.E.2d at 660 (citing *In re Harton*, 156 N.C. App. 655, 577 S.E.2d 334 (2003)). Specifically, “the trial court should not broadly incorporate these written reports from outside sources as its findings of fact.” *J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660.

In this case, Respondent argues generally that the trial court erred by incorporating the DSS and guardian *ad litem* reports and that “[i]t is difficult to assess how much weight the court gave in its decision and disposition to those matters . . . which were purportedly read and incorporated in the order, but which were not articulated in its order.” Respondent’s argument is without merit. We hold that the trial court properly incorporated DSS and guardian *ad litem* reports and properly made findings of fact, included in the permanency planning order, based on these reports. Moreover, these findings are sufficient to support the trial court’s ultimate determination, and there is no evidence that Judge Turner relied on information from the reports that he then failed to include as a finding of fact in his order. Accordingly, this assignment of error is overruled.

[11] Respondent next argues that the trial court’s finding “[t]hat the mother of the juvenile has not complied with previous orders of the Court to keep the juvenile away from Josh Ryan” was not supported by the evidence presented at the 27 October 2005 hearing and that, by relying on prior court orders, DSS reports and guardian *ad litem* reports, the trial court unfairly prejudiced Respondent’s rights.

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In the juvenile petition, DSS alleged that Josh Ryan, “a sexual offender from another state [was] living in the home [with L.B.] and [Respondent] lied to law enforcement to protect him.” The petition further alleged that “L.B. indicated that she feels uncomfortable in the presence of Josh[,] . . . Josh has sung sexually explicit songs in her presence and made statements to her such as ‘he is tired of being a screw buddy with her mother.’” Respondent’s relationship with Josh Ryan, and the concern expressed by DSS regarding his presence around L.B., is documented in court reports and orders contained in the record on appeal.

Although Respondent is correct in her assertion that no new evidence was presented at the hearing regarding her current relationship with Josh Ryan and his presence around L.B., we believe that this finding merely indicates that Respondent had not previously complied with court orders requiring her to eliminate contact between Josh Ryan and L.B. In its finding that Respondent failed to comply with the prior court order, the trial court simply recognized that Respondent had placed the importance of her relationship with Josh Ryan above the welfare of her child. This finding was proper and relevant to the trial court’s determination.

Additionally, had the trial court included this finding in error, we believe that, absent this finding, there remained sufficient evidence presented through court documents in the record and by testimony at the hearing to support the trial court’s ultimate determination that the permanent plan for L.B. should be a change of custody, with the Johnsons being designated her guardians. Accordingly, we find Respondent’s argument without merit.

[12] By her final argument, Respondent contends that the trial court abused its discretion in ordering her to undergo a psychological evaluation and erred by finding that she had not previously complied with the trial court’s order directing such an evaluation.

Under North Carolina law,

[a]t the dispositional hearing or a subsequent hearing the court may determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile’s adjudication or the court’s decision to remove custody of the juvenile from the parent[.] If the court finds that the best

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interests of the juvenile require the parent . . . [to] undergo treatment, it may order that individual to comply with a plan of treatment approved by the court or condition legal custody or physical placement of the juvenile with the parent . . . upon [the parent's] compliance with the plan of treatment.

N.C. Gen. Stat. § 7B-904(c) (2005). In *In re Cogdill*, 137 N.C. App. 504, 528 S.E.2d 600 (2000), this Court determined that a trial court properly ordered a parent to undergo a psychological evaluation when it was determined that the parent was aware that her daughter was being abused and did not tell the truth in court regarding the abuse.

In this case, in the 19 August 2004 petition, the allegations levied by DSS against Respondent included claims that Respondent was double medicating L.B. and that she placed her daughter in a compromising position by living with a sex offender, who made inappropriate comments of a sexual nature to the juvenile. Respondent then compounded this problem by lying to law enforcement to protect the sex offender. Further, during the 29 November 2004 hearing, “the mother admitted that at the time of the filing of the petition, the juvenile was a neglected and dependent juvenile and that there is a factual basis to make such a finding.” Based on the serious nature of these allegations, Respondent’s concession that her daughter was neglected, and this Court’s holding in *Cogdill*, we hold that the trial court did not err in ordering Respondent to undergo a psychological evaluation.

Additionally, at the hearing, Respondent’s own testimony supported the trial court’s determination that Respondent had failed to comply with the court’s previous order that she undergo a psychological or psychiatric evaluation and comply with the recommendations of the evaluator. Therefore, we overrule this assignment of error.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges STEELMAN and GEER concur.

The judges concurred and submitted this opinion for filing prior to 31 December 2006.

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STATE OF NORTH CAROLINA v. WILFORD BENJAMIN SHELLY

No. COA05-1395

(Filed 2 January 2007)

1. Confessions and Incriminating Statements— right to counsel—hope of leniency—totality of circumstances—failure to make written findings and conclusions

A review of the totality of the circumstances revealed that the trial court did not err in a first-degree murder and conspiracy to commit first-degree murder case by admitting defendant's confession even though defendant alleged error including a violation of his right to counsel, the confession was made under the hope of leniency created by the interrogating officer, and the trial court failed to make written findings of fact and conclusions of law, because: (1) while there are no magic words which must be uttered in order to invoke one's right to counsel, a suspect must unambiguously request counsel to warrant the cessation of questions and must articulate his desire to have counsel present sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney; (2) no reasonable officer would have understood defendant's words as an actual request for an attorney; (3) in no way did the pertinent officer badger, intimidate, or threaten defendant into waiving his rights, nor did he ignore an unambiguous invocation of defendant's right to counsel; (4) after obtaining an understanding of the process of having an attorney appointed, defendant chose to sign the waiver form and proceed with the interview; (5) defendant did not ask the investigating officer if he needed an attorney and was not told by the officer that he did not need one; (6) at no point did the officer block defendant's right to remain silent or defendant's ability to actually request an attorney; (7) the officer did not suggest that defendant might not receive appointed counsel, but instead merely informed defendant that the appointment of counsel would not occur immediately; (8) the officer did not promise any different or preferential treatment as a result of defendant's cooperation, but merely offered an opinion based on his professional experience; and (9) contrary to defendant's assertion, N.C.G.S. § 15A-977(f) does not mandate a written recording of findings and conclusions, the trial court provided its rationale from the bench, and there were no material conflicts in the evidence.

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2. Appeal and Error— preservation of issues—waiver—switching legal theories

Although defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree murder, this assignment of error has been waived, because: (1) defendant changed legal theories to support his position between the trial court and the Court of Appeals; and (2) assuming arguendo that defendant had properly presented his corpus delicti argument to the trial court and then to the Court of Appeals, it is without merit when in addition to defendant's confession the State presented evidence through the chief medical examiner that the victim died as a result of multiple gunshot wounds.

3. Conspiracy— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit first-degree murder, because: (1) evidence of a conspiracy may be circumstantial or inferred from defendant's behavior; (2) the crime of conspiracy does not require an overt act for its completion and the agreement itself is the crime; and (3) taking the evidence in the light most favorable to the State revealed that defendant and his cousin had fought with the victims on 1 January 2002, and later that day defendant and two others procured weapons, sought out the victims, and killed them.

4. Homicide— first-degree murder—indictment—failure to allege each element—sufficiency

Our Supreme Court has already concluded that an indictment charging defendant with first-degree murder is sufficient even though it does not allege every element of first-degree murder.

5. Criminal Law— instruction—flight

The trial court did not err in a first-degree murder and conspiracy to commit first-degree murder case by its instruction to the jury on flight, because: (1) evidence presented at trial established that defendant left the scene of the shooting and did not return home, but instead he spent the night at the home of his cousin's girlfriend; and (2) this action was not part of defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension.

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Appeal by Defendant from judgments entered 12 October 2004 by Judge James Floyd Ammons, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 6 June 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for the State.

Stubbs, Cole, Breedlove, Prentis & Biggs, PLLC, by C. Scott Holmes, for Defendant-Appellant.

STEPHENES, Judge.

Defendant appeals from judgments entered on jury verdicts finding him guilty of first-degree murder and conspiracy to commit first-degree murder in the death of Malcom Jackson. Defendant was sentenced to life imprisonment without parole on the conviction of first-degree murder and to a minimum term of 157 months and a maximum term of 198 months on the conviction of conspiracy to commit first-degree murder, with the sentences to run consecutively. At trial, the State's evidence tended to show the following:

On the afternoon of 1 January 2002, Andre Jackson ("A.J.") and his brother Malcom Jackson ("Malcom") were murdered beside a wooded dirt road near the Kelly Springfield plant in Cumberland County. Their friends Rodney Wilkerson ("Rodney") and Tracie New ("Tracie") witnessed the murders. The previous night, on New Year's Eve, A.J. and Defendant's uncle, Earl Shelly ("Earl"), had an altercation at Defendant's apartment. A.J. was removed from the apartment, but during the morning of 1 January 2002, returned with his brother Malcom and fought with Defendant and Defendant's cousin, Lamont Shelly ("Lamont").

Later that day, Defendant and Lamont drove to their grandmother's home to pick up Earl and then to Lamont's sister's home, where they picked up a 12-gauge shotgun. The three men returned to Defendant's apartment and located his .380 handgun. Later that same day, Rodney, Malcom, A.J., and Tracie were parked down a dirt road near the Kelly Springfield plant. Rodney, Malcom, and A.J. were in one car, while Tracie was alone in her own car.

At trial, Rodney testified that, while they were parked, he heard a car coming and saw Earl hanging out the window with a "big gun." Malcom got out and stood behind the driver's side door, while Rodney ran around to the back of the car and put his hands into the air. After Rodney was secure behind the car, he ran away from

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the scene. As he was running, he heard a shot fired, glass shattering, and Malcom yelling.

Tracie testified she saw Malcom get out of the car and put his hands in the air before Earl shot him with the shotgun. The Shelly car then stopped, and Tracie saw Lamont get out of the car with a handgun and shoot Malcom in the head while Malcom was lying on the ground. She saw a third person in the Shelly vehicle, but could not identify that person. When Earl fired another shot through the windshield and hit A.J., Tracie drove away in her car.

After Rodney left the scene, he ran home and notified the police. Upon investigation, deputies found a car parked off a dirt road near the Kelly Springfield plant with the bodies of Malcom and A.J. lying near it on the ground. They found six 12-gauge shotgun shell casings and five .380 casings near the bodies. Dr. John D. Butts, Chief Medical Examiner for the State of North Carolina, determined that both A.J. and Malcom died as a result of multiple gunshot wounds. A Lorcin .380 Model L 380 handgun was recovered in the woods near the home of Defendant's cousin, Tommie Shelly. Also, a Mossberg Model 88 12-gauge shotgun was obtained from a source close to Defendant. A firearms expert examined the weapons and determined that the shell casings, buckshot and bird shot pellets, and bullets found at the scene and recovered from the bodies of the deceased, were fired from these weapons.

After speaking with Rodney, Tracie, and other parties, Cumberland County Sheriff's investigators identified Earl Shelly, Lamont Shelly, and Defendant as suspects. At the time of Defendant's detainment, on 2 January 2002, a .380 round of ammunition was found in his pocket.

Defendant was interviewed by investigators at the Cumberland County Sheriff's Office, where, after executing a General Adult Rights Form, he confessed to shooting Malcom in the head with the handgun. On 23 July 2002, a grand jury indicted Defendant on two charges of first-degree murder and two charges of conspiracy to commit first-degree murder, in the deaths of A.J. and Malcom.

Defendant's counsel filed a motion to suppress Defendant's confession and a supporting affidavit as required by N.C. Gen. Stat. § 15A-977. After hearing arguments on the motion, the trial court orally entered the following findings of fact into the record: (1) the interrogation occurred while Defendant was in custody and lasted approximately one hour; (2) Defendant asked "about whether an

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attorney can come . . . up here and see me?”; (3) Defendant indicated, “I am very ignorant of all this”; (4) a conversation ensued about the availability of a public defender; and (5) Defendant never expressly stated that he wanted a lawyer present, did not understand his rights, or wanted to stop talking.

On these findings, the trial court denied Defendant’s motion to suppress his confession. The case was then tried in Cumberland County Superior Court between 29 September and 8 October 2004. At the end of the trial, the jury found Defendant not guilty of first-degree murder or conspiracy to commit first-degree murder in the death of A.J. The same jury found Defendant guilty of first-degree murder and conspiracy to commit first-degree murder in the death of Malcom. From the judgments entered upon these convictions, Defendant appeals. We find no error.

[1] Defendant first assigns error to the trial court’s admission of his confession. Defendant argues that his confession should have been suppressed because he invoked his right to counsel and it was not honored by the police; the police advised Defendant of his right to counsel and then effectively blocked the assertion of this right; the confession was made under the hope of leniency created by the interrogating officer; and the trial court failed to make written findings of fact and conclusions of law after the suppression hearing.

Defendant contends that the trial court’s findings of fact and conclusions of law regarding the voluntariness of the confession constitute reversible error because there were material conflicts in the evidence during the motion to suppress hearing. That is, Defendant argues that the trial court erred in denying his motion to suppress the confession because there was competent evidence presented at the suppression hearing supporting his position that he invoked his right to counsel, the assertion of his right to counsel was blocked by the interrogating officer, and his confession was made under the hope of leniency. Findings of fact relating to the voluntariness of a confession are binding on our Court if supported by competent evidence in the record. *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). We may not set aside or modify findings substantiated by evidence, even if the evidence is conflicting. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983) (citations omitted).

In determining whether the trial court’s finding that Defendant’s statement was voluntary is supported by competent evidence,

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we must review the totality of the surrounding circumstances in which the statement was made. *State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001). A statement is involuntary or coerced if it is the result of government tactics so oppressive that the will of the interrogated party “‘has been overborne and his capacity for self-determination critically impaired[.]’” *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58 (1961) (citation omitted)). Our Supreme Court has established several factors that should be considered in determining the voluntariness of statements:

[W]hether defendant was in custody, whether he was deceived, whether his *Miranda* rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

State v. Hardy, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citations omitted).

First, Defendant argues the trial court improperly determined that he failed to invoke his right to counsel and, consequently, we should view his statement as involuntary. Defendant cites *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992), to support his contention that a defendant can invoke his right to counsel simply by asking a law enforcement officer if he needed a lawyer, since that question may indicate a desire to have the help of an attorney during police interrogation. While we acknowledge “there are no ‘magic words’ which must be uttered in order to invoke one’s right to counsel,” *id.* at 528, 412 S.E.2d at 26, we have, since *Torres*, held that “[a] suspect must unambiguously request counsel to warrant the cessation of questions and ‘must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.’” *State v. Barnes*, 154 N.C. App. 111, 118, 572 S.E.2d 165, 170 (2002) (quoting *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994)), *disc. review denied*, 356 N.C. 679, 577 S.E.2d 892 (2003). Until a suspect makes such an unambiguous request, the police may continue to question him. *Id.*

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During questioning, Defendant said to the investigator, Officer Disponzio, “I don’t know if I go ahead an tell you then when I do get my lawyer . . . I’ve done wrong, because I went ahead and said anything or—I don’t know.” This statement is ambiguous because Defendant neither refused nor agreed to answer Officer Disponzio’s questions without an attorney present. This ambiguous statement fails to meet the standard established by *Davis* and *Barnes* as a guide for police investigation and interrogation. We hold that no reasonable officer under the circumstances would have understood Defendant’s words as an “actual request” for an attorney.

Additionally, questions from Defendant such as, “Oh, so I can have a lawyer come here now?”, and “one won’t be appointed to me now?”, when examined in the context in which they were made, also fail to meet the current standard for invoking one’s right to counsel. That is, after a thorough review of the interview transcript, we note the informative nature of the conversation between Defendant and the officer in the beginning of the interview, and believe that Defendant asked these questions and received answers from Officer Disponzio in an effort to understand his rights and the interview process before choosing to invoke or forego his constitutional right to counsel. In no way did Officer Disponzio badger, intimidate, or threaten Defendant into waiving his rights, nor did he ignore an unambiguous invocation of Defendant’s right to counsel. For example, when Defendant asked these questions, Officer Disponzio offered a clear and truthful answer by telling Defendant that “unless you have your own personal lawyer . . . [o]ne will be appointed to you when you go to court.” After obtaining an understanding of the process of having an attorney appointed, Defendant chose to sign the waiver form and proceed with the interview. Therefore, in asking these questions, we do not believe that Defendant unambiguously requested counsel.

Furthermore, Defendant’s questions are clearly distinguishable from the circumstances present in *Torres*. For example, in *Torres*, the defendant “‘asked [Sheriff] Nelson [Sheppard] did she need a lawyer and he told her no that it was best right now to cooperate and tell the truth and that they had been friends for a long time.’” *Torres*, 330 N.C. at 523, 412 S.E.2d at 23. In this case, Defendant did not ask the investigating officer if he needed an attorney and was not told by the officer that he did not need one. Rather, Defendant asked general questions about his right to counsel and explained his discomfort with the situation in which he found himself. In return, the officer,

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after explaining to Defendant that “I can’t legally tell you to do something[,]” informed him about the logistics of the process. Since Defendant did not clearly and unambiguously invoke his right to counsel, his statements to the officer were admissible.

Next, Defendant argues Officer Disponzio “blocked” the exercise of his right to counsel by emphasizing the difficulties and time delay involved in obtaining a court-appointed attorney. In support of his contention, Defendant cites *State v. Steptoe*, 296 N.C. 711, 252 S.E.2d 707 (1979). However, unlike the defendant in *Steptoe*, Defendant had not invoked his right to counsel or requested a court-appointed attorney during interrogation.

Defendant in this case never specifically requested that an attorney be present during interrogation and thus never invoked his right to counsel. Rather, Defendant made numerous ambiguous statements and asked numerous ambiguous questions. By way of explaining Defendant’s options, Officer Disponzio responded, “[T]his is totally your choice. . . . No one can make you do anything.” Officer Disponzio went on to explain:

Tomorrow morning you’ll have a first appearance in court. At that time the judge is gonna read you your rights . . . you’ll tell him I need a public defender and he’ll assign you one and then from there it’s up to your public defender to come and contact you. We don’t contact you any more after today.

Defendant then asked Officer Disponzio, “Would there be like—somebody to come up here and see me?”, to which Officer Disponzio replied, “Today? Not today, no.” While Officer Disponzio’s responses to Defendant’s questions were intended to eventually procure a voluntary statement from Defendant, at no point did Officer Disponzio “block” Defendant’s right to remain silent or Defendant’s ability to “actually request” an attorney.

Furthermore, Officer Disponzio did not suggest, as did the officer in *Steptoe*, that Defendant might not receive appointed counsel; instead, he merely informed Defendant that the appointment of counsel would not occur immediately. Thus, at no point was Defendant inhibited from unambiguously articulating his desire to have counsel present. On the contrary, as a result of Officer Disponzio’s explanations, Defendant was fully informed of his rights and knowingly, understandingly and voluntarily waived his right to counsel, as evidenced by his execution of a waiver form. *See id.* at 717, 252 S.E.2d at 711. Accordingly, this argument is without merit.

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Defendant further argues, however, that his statement was rendered involuntary by statements of the officer which created a hope of leniency. Specifically, Defendant contends that Officer Disponzio's comment, "I can tell you that a person who cooperates and shows remorse and is honest and has no criminal background—when it goes to court, has the best chance of getting the most leniency because he cooperated[,]" created a hope of leniency that induced Defendant to confess to the murder, where he would have otherwise made no statement. We disagree.

When evaluating the voluntariness of a confession, "[t]he proper determination is whether the confession at issue was the product of 'improperly induced hope or fear.'" *State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (quoting *State v. Corley*, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (1984)), cert. denied, 537 U.S. 896, 154 L. Ed. 2d 165 (2002). For a confession to be held involuntary, the "improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage." *Gainey*, 355 N.C. at 84, 558 S.E.2d at 471 (citing *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975)).

In this case, Officer Disponzio did not promise Defendant any different or preferential treatment as a result of Defendant's cooperation. The officer merely offered an opinion based on his professional experience. Thus, competent evidence supports the trial court's findings that no improper promises were made to Defendant to induce an involuntary confession. This argument is likewise without merit.

Finally, Defendant argues that the trial court erred by not making written findings of fact when it denied the motion to suppress his confession. North Carolina General Statute section 15A-977(f) states that, following a hearing on a motion to suppress evidence, "[t]he judge must set forth in the record his findings of facts and conclusions of law." N.C. Gen. Stat. § 15A-977(f) (2003). Defendant contends the statute mandates a written recording of these findings and conclusions. We disagree.

In *State v. Jacobs*, 174 N.C. App. 1, 8, 620 S.E.2d 204, 209 (2005), this Court determined that the trial court did not err when it failed to enter written findings because "the trial court did provide its rationale from the bench." The *Jacobs* Court further relied on a prior decision from our Supreme Court that determined "[i]f there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact. . . .

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In that event, the necessary findings are implied from the admission of the challenged evidence.” *Id.* (quoting *State v. Phillips*, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980)). In this case, as in *Jacobs*, the trial court provided its rationale from the bench and there were no material conflicts in the evidence. Rather, the conflict occurred between how Defendant and the trial court interpreted his alleged assertion of his right to counsel and the facts surrounding this alleged assertion. Therefore, we find this argument without merit. Defendant’s assignment of error relating to the admission of his confession is overruled.

By his next argument, Defendant contends that the trial court erred in denying his motion to dismiss the charges of first-degree murder and conspiracy to commit first-degree murder.

Upon a motion to dismiss, the trial court must determine whether there is substantial evidence, taken in the light most favorable to the State, of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant’s being the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The evidence is considered in the

light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Powell, 299 N.C. at 99, 261 S.E.2d at 117 (citing *State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975)). The trial court is concerned only with the sufficiency of the evidence to go to the jury, and not the weight to be accorded the evidence. *State v. Thaggard*, 168 N.C. App. 263, 608 S.E.2d 774 (2005).

[2] We first address Defendant’s argument regarding the charge of first-degree murder. When Defendant made his “motion for judgment of acquittal” before the trial court, he argued

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as to Malcom Jackson, the only evidence that has been presented by the state concerning this defendant's involvement in the death of Malcom Jackson was through this defendant's testimony that there was an accidental discharge which occurred during a struggle, in an attempt to assist . . . his uncle . . . to keep Malcom from taking the shotgun away from his uncle.

It is clear from this statement that Defendant argued to the trial court that Malcom's death was accidental, and therefore, that the charge of first-degree murder, which by statute requires a "willful, deliberate, and premeditated killing," should have been dismissed. *See* N.C. Gen. Stat. § 14-17 (2003). However, in his brief to this Court, Defendant presents an argument based on the rule of *corpus delicti*. The *corpus delicti* rule requires "that there be corroborative evidence, independent of defendant's confession, which tended to prove the commission of the charged crime." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986) (citations omitted). "The *corpus delicti* rule only requires *evidence aliunde* the confession which, when considered with the confession, supports the confession and permits a reasonable inference that the crime occurred." *Trexler*, 316 N.C. at 532, 342 S.E.2d at 880 (citing 30 Am.Jur.2d *Evidence* § 1142 (1967)). On appeal, the State asserts that because Defendant changed legal theories to support his position between the trial court and this Court, this assignment of error has been waived by Defendant. We agree.

The North Carolina Rules of Appellate Procedure govern the preservation of error for appellate review. The applicable rule provides:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

N.C. R. App. P. 10(b)(1). "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order

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to get a better mount in the appellate courts.” *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002) (citations and quotations omitted); *see also State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). When a party changes theories between the trial court and an appellate court, the assignment of error is not properly preserved and is considered waived. *Id.*

In the case currently before this Court, it is clear that Defendant has impermissibly changed theories between the trial court and the appellate Court. As a result, this argument has been waived. Moreover, assuming *arguendo* that Defendant had properly presented his *corpus delicti* argument to the trial court and then to this Court, we find it without merit. In addition to Defendant’s confession, the State presented evidence, through Dr. Butts, the Chief Medical Examiner, that Malcom died as a result of multiple gunshot wounds. This evidence, along with Defendant’s confession, is sufficient to support the trial court’s decision to deny Defendant’s motion to dismiss.

[3] We likewise are unpersuaded by Defendant’s argument that the State failed to offer substantial evidence on the conspiracy charge to survive his motion to dismiss. “A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice.” *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted). This evidence may be circumstantial or inferred from the defendant’s behavior. *See State v. Choppy*, 141 N.C. App. 32, 539 S.E.2d 44 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). The crime of conspiracy does not require an overt act for its completion; the agreement itself is the crime. *State v. Bindyke*, 288 N.C. 608, 220 S.E.2d 521 (1975).

When taking the evidence in the light most favorable to the State, the evidence tended to show that Defendant and his cousin had fought with A.J. and Malcom on 1 January 2002. Later that day, Defendant, his cousin, and their uncle procured weapons, sought out A.J. and Malcom, and killed them. From these actions, a conspiracy can be inferred. Accordingly, this argument is overruled.

[4] Defendant next assigns error to the failure of the indictment to allege every element of first-degree murder. In *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d

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498 (2000), our Supreme Court rejected the same argument that Defendant presents to this Court. Defendant acknowledges the prior decision by our State's high court and only raises the issue to preserve the error for a future appeal. Regardless, based on the direction provided by our Supreme Court, we must overrule this assignment of error.

[5] By his final argument, Defendant contends the trial court erred because there was insufficient evidence to support the court's instruction to the jury on "flight," that is, that he fled the scene of the crime. Judge Ammons instructed the jury within the guidelines provided by the North Carolina pattern jury instructions, as follows:

Now, the State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amounted to an admission or a show of consciousness of guilt. However, proof of this circumstance is not sufficient in and of itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

A jury instruction on flight is proper where "‘some evidence in the record reasonably support[s] the theory that defendant fled after commission of the crime charged.’" *State v. Levan*, 326 N.C. 155, 164-65, 388 S.E.2d 429, 434 (1990) (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)). When there is some evidence, "it is the duty of the jury to determine whether the facts and circumstances support the State’s theory." *State v. Goblet*, 173 N.C. App. 112, 120, 618 S.E.2d 257, 263 (2005) (citing *State v. Norwood*, 344 N.C. 511, 476 S.E.2d 349 (1996) (citations omitted), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997)). "The relevant inquiry is whether the evidence shows that defendant left the scene of the crime and took steps to avoid apprehension." *State v. Grooms*, 353 N.C. 50, 80, 540 S.E.2d 713, 732 (2000) (citing *Levan*, 326 N.C. at 165, 388 S.E.2d at 429), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001).

Defendant relies on *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991), to support his contention that a jury instruction on flight was not warranted. In *Thompson*, the defendant assigned error to the trial court's decision *not* to provide his requested instruction on

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flight. In rejecting the defendant's argument in that case, our Supreme Court determined that evidence showing that the defendant left the scene of the crime, drove to an off-limits area of a military base, stopped his vehicle next to a dumpster behind the officer's club, and drove off when approached by a military police car, standing "alone is not enough to warrant an instruction on flight." *Id.* at 490, 402 S.E.2d at 393. However, in *Thompson*, the military base to which the defendant drove was the same base to which he was stationed as a member of the United States Army. *Id.* Therefore, the defendant returned to a place where, if necessary, law enforcement officers could find him. Essentially, the defendant returned home.

Here, evidence presented at trial established that Defendant left the scene of the shooting and did not return home. Rather, he spent the night at the home of his cousin's girlfriend, an action that was not part of Defendant's normal pattern of behavior and could be viewed as a step to avoid apprehension. Accordingly, the trial court did not err in instructing the jury on flight.

In the trial of Defendant on charges of first-degree murder and conspiracy to commit first-degree murder, we find

NO ERROR.

Judges WYNN and GEER concur.

The judges concurred and submitted this opinion for filing prior to 31 December 2006.

STATE OF NORTH CAROLINA v. JANIE LATONYA PERKINS, DEFENDANT

No. COA06-320

(Filed 2 January 2007)

1. False Pretense— indictment—false representation of subsisting fact

An indictment charging defendant with obtaining property by false pretenses was not fatally defective even though defendant contends the indictment failed to allege a false representation of a subsisting fact, because: (1) by alleging that defendant

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used credit and check cards that were issued in the name of another person, that were wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards; and (2) the indictment adequately described the actions taken by defendant including her use of cards belonging to another person, wrongfully obtained, and without authorization, that led to the acquisition of merchandise.

2. False Pretense— sufficiency of evidence—false representation—intent to deceive

The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses even though defendant contends the State failed to present sufficient evidence of false representation and of defendant's intent to deceive the store, because: (1) a false pretense may be established by conduct alone and does not necessarily depend upon the utterance of false or misleading words; and (2) a jury could reasonably infer from the evidence that defendant, through her actions, falsely represented to the store her authority to use the victim's credit cards and that her intent was to deceive the store.

3. Burglary and Unlawful Breaking or Entering— unlawful entry—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of breaking or entering even though defendant contends the State failed to prove an unlawful entry when she entered a law office that was open to members of the public, because: (1) even if an entry is initially legal, subsequent conduct of the entrant may render the consent to enter void ab initio; and (2) a jury could find that based on an attorney's prohibiting defendant from coming to his office, the first entry was nonconsensual, and even if that directive is disregarded, the jury could also reasonably find that defendant falsely told the attorney that she was in the office to see a secretary in order to obtain access to the private areas of the law offices.

4. Larceny— acting in concert—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious larceny of credit cards because there was substantial evidence that defendant and her coparticipant acted together in pursuit of a common plan or purpose and

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that defendant was therefore guilty of larceny even though the breaking or entering to steal the credit cards was actually committed by the coparticipant.

5. Burglary and Unlawful Breaking or Entering;— verdicts—misdemeanor breaking or entering—felonious larceny—not inconsistent

The jury's initial verdict of guilty of misdemeanor breaking or entering was not legally inconsistent with the jury's verdict of guilty of felony larceny of credit cards, and the trial court should have accepted the initial verdict, where evidence tended to show that defendant and a male companion made unlawful entries into nonpublic areas of a law firm in the morning; the male companion made another entry into the law firm in the afternoon and a lawyer's credit cards were stolen in the afternoon; and the jury could reasonably have found that the State failed to prove defendant's intent to commit larceny when she entered the firm in the morning and that she was guilty of misdemeanor breaking or entering based on her morning entries.

6. Larceny— verdicts—felony larceny—not guilty of felony breaking or entering

When a jury is instructed that a defendant may be guilty of felony larceny because she acted in concert with another individual following a breaking or entering, a conviction for felony larceny is legitimate even though defendant may be found not guilty of felony breaking or entering.

7. Criminal Law— motion for mistrial—defendant's own misconduct

The trial court did not abuse its discretion in an obtaining property by false pretenses, felony larceny, and felony breaking or entering case by denying defendant's motion for a mistrial after a juror overheard defendant's remark to her attorney that she was leaving her own trial, and the trial court questioned the juror about the incident in front of the entire jury, because: (1) while it would have been the better practice to interview the juror individually, a review of the record indicated that the trial court nonetheless acted within its discretion when the situation was of defendant's own making since she chose to flee the trial after announcing her intentions in the public stairwell; (2) arguments for a mistrial do not carry great weight when the conduct relied upon arise from a defendant's own misconduct; and (3) the jurors

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each indicated, upon polling by the trial court, that they could remain fair and impartial.

Appeal by defendant from judgments entered 3 November 2005 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 12 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Sueanna P. Sumpter, for the State.

Glenn Gerdung for defendant-appellant.

GEER, Judge.

Defendant Janie Latonya Perkins appeals from her convictions of obtaining property by false pretenses, felony larceny, and felony breaking or entering. On appeal, defendant argues primarily that the trial court erred in rejecting the jury's initial verdict of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses and ordering the jury to redeliberate. Because the initial verdicts of misdemeanor breaking or entering and felony larceny were not necessarily legally inconsistent, we reverse and remand for entry of judgment on the jury's original verdicts. We find defendant's remaining arguments unpersuasive and, therefore, hold that defendant otherwise received a trial free of prejudicial error.

Facts and Procedural History

The State presented evidence at trial that tended to show the following facts. At around 8:30 a.m. on the morning of 18 August 2004, Michael Grace, an attorney with the law firm of Grace, Holton, Tisdale, and Clifton, encountered defendant inside the entryway of the firm's Winston-Salem office. Mr. Grace was familiar with defendant from a time when he worked at a different office. While at that office, Mr. Grace had instructed defendant to stay away from his office. On the morning of 18 August 2004, Mr. Grace reminded defendant that he did not want her in his office. When, however, defendant mentioned that she was at the firm to see a secretary, Mr. Grace assumed defendant was being represented by another member of the firm and directed defendant to one of the firm's office managers, Marilyn Moore.

Later that morning at about 10:30 a.m., Ms. Moore noticed a black male wearing a sports jersey coming down a hallway from the rear of the firm's office. As Ms. Moore stepped into the hallway, she saw

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defendant in the hallway, beyond the public reception area, as well. Ms. Moore asked defendant if she needed assistance, and defendant responded by indicating that she was with the man in the jersey. The man told Ms. Moore that he wanted to see attorney Mireille Clough, but Ms. Moore informed him that Ms. Clough was presently out of the office. Shortly thereafter, both defendant and her male acquaintance left the premises. No testimony presented at trial placed defendant at the firm after this point.

After having an early lunch on 18 August 2004, Ms. Clough returned to the firm's office. Since she was scheduled to appear in court at 1:00 p.m., she dropped off a bag of personal belongings inside her office and then departed for court. Inside the bag was a day planner that contained several of Ms. Clough's credit cards.

Around 1:30 p.m., Don Tisdale, another attorney with the firm, was returning to the office from lunch when he spotted a black male in a sports jersey coming out of Ms. Clough's office. When Ms. Clough returned to the office after court, at approximately 3:30 p.m., she discovered the day planner missing. She contacted her credit card companies and learned her cards had been used to make multiple purchases that afternoon at a Food Lion store on Waughtown Street.

Ms. Clough then contacted the police. She met with police officers at the Food Lion and reviewed the store's surveillance videotape. The videotape showed a woman, identified at trial as defendant, and a black male in a jersey at the checkout counter making purchases. Four separate transactions, in amounts ranging from \$79.15 to \$178.57, were accomplished in less than fifteen minutes using Ms. Clough's cards. Store receipts revealed that defendant had signed Ms. Clough's name to complete the purchases.

As two police officers, Detectives Gregory Dorn and Michael Poe, were driving to interview a witness in connection with the purchases at Food Lion, one of them noticed defendant coming out of a house at 1424 Waughtown Street. They stopped and approached defendant, explaining to her that they had seen her on a videotape using a credit card to make purchases at the Food Lion. Defendant at first denied having been at the Food Lion, but then admitted being there, telling the officers that she had used a credit card belonging to her aunt. Defendant then changed her story again, telling the police that "a guy named Steve" let her use the card at Food Lion.

After defendant was placed under arrest, she led police to a nearby wooded area where the day planner and customer receipts

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from Food Lion were recovered. At 1424 Waughtown Street, a man named Steven Brooks was also found and arrested. The police identified Brooks from the videotape as the same man who accompanied defendant at Food Lion. Ms. Clough's credit cards were later found in a flower pot at the house on Waughtown Street.

Defendant was subsequently indicted on charges of obtaining property by false pretenses, felony breaking or entering, felony larceny, and having obtained the status of habitual felon. At trial, the judge instructed the jury as to both misdemeanor and felony breaking or entering and larceny. The jury returned verdicts finding defendant guilty of misdemeanor breaking or entering, felony larceny, and obtaining property by false pretenses. After reviewing these verdicts, the judge sent the jury out and told the parties that the verdicts as to misdemeanor breaking or entering and felony larceny were "legally inconsistent."

The judge then summoned the jurors back to the courtroom, explained to them "that the verdicts are not legally consistent," and directed the jury to resume deliberations. After deliberating for a second time, the jury returned a new verdict sheet finding defendant guilty of felony breaking or entering and, again, of felony larceny. Defendant was subsequently found guilty of being a habitual felon. The trial court imposed two consecutive sentences of 110 to 141 months imprisonment. Defendant gave timely notice of appeal.

Discussion*I. Indictment for Obtaining Property by False Pretenses*

[1] Defendant argues that her indictment on the charge of obtaining property by false pretenses was fatally defective, depriving the trial court of jurisdiction. "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498, 121 S. Ct. 581 (2000).

A bill of indictment must contain:

[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the

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defendant or defendants of the conduct which is the subject of the accusation.

N.C. Gen. Stat. § 15A-924(a)(5) (2005). The crime of obtaining property by false pretenses is defined as “(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.” *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant contends that the indictment failed to allege a false representation of a subsisting fact.

The indictment at issue alleged that defendant:

unlawfully, willfully and feloniously did knowingly and designedly, with the intent to cheat and defraud, attempted to obtain BEER AND CIGARETTES from FOOD LION by means of a false pretense which was calculated to deceive. The false pretense consisted of the following: THIS PROPERTY WAS OBTAINED BY MEANS OF USING THE CREDIT CARD AND CKECK [sic] CARD OF MIRIELLE CLOUGH WHEN IN FACT THE DEFENDANT WRONGFULLY OBTAINED THE CARDS AND WAS NEVER GIVEN PERMISSION TO USE THEM.

By alleging that defendant used a card that was issued in the name of another person, that was wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards. A “false pretense need not come through spoken words, but instead may be by act or conduct.” *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001), cert. denied, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002). Here, the indictment adequately described the actions taken by defendant—i.e., her use of a card belonging to another person, wrongfully obtained, and without authorization—that led to the acquisition of the merchandise. We accordingly hold that the allegations in the indictment support the false representation element of the offense.

As defendant was put on notice of the charge against her, we do not find the indictment to be defective for a lack of detail or specificity. See *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (an indictment “is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subse-

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quent prosecution for the same offense' " (quoting *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984))). This assignment of error is overruled.

II. Motion to Dismiss

Defendant next contends that the trial court erred in denying her motion to dismiss. In ruling on a criminal defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270 (2001) (quoting *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984)). When considering the issue of substantial evidence, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

[2] With respect to the charge of obtaining property by false pretenses, defendant argues that the State failed to present sufficient evidence of a false representation and of defendant's intent to deceive the Food Lion store. In particular, defendant contends that no evidence at trial showed any "verbal" misrepresentations by defendant. As our Supreme Court recognized in *Parker*, however, a false pretense may be established by conduct alone and does not necessarily depend upon the utterance of false or misleading words. 354 N.C. at 284, 553 S.E.2d at 897.

At trial, the State introduced videotape evidence showing defendant at Food Lion making purchases. In addition, the store receipts from those transactions showed that defendant accomplished the purchases with cards belonging to Ms. Clough and, further, that defendant had signed the receipts with the misspelled signature of Ms. Clough. From this evidence, a jury could reasonably infer that defendant, through her actions, falsely represented to Food Lion her authority to use Ms. Clough's credit cards and that her intent was to deceive Food Lion. See *id.* at 285, 553 S.E.2d at 897-98 (holding "defendant's actions constituted a false pretense" where defendant drove to bank teller window and, while holding victim hostage in pas-

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senger seat, presented victim's driver's license and withdrawal slip to teller in order to obtain cash; Court concluded that "[d]efendant falsely represented to the bank that the withdrawal was legitimate and had the continuing support of the victim"). Consequently, the trial court properly denied her motion to dismiss the charge of obtaining property by false pretenses.

[3] With respect to the breaking or entering charge, N.C. Gen. Stat. § 14-54(a) (2005) provides that it is a felony to "break[] or enter[] any building with intent to commit any felony or larceny therein . . ." It is, however, a misdemeanor when one simply "wrongfully breaks or enters any building" without the specified intent. N.C. Gen. Stat. § 14-54(b). *See State v. Boone*, 297 N.C. 652, 658, 256 S.E.2d 683, 686 (1979) ("[T]he only distinction between [subsections (a) and (b)] is] the lack of felonious intent in the case of the misdemeanor."). Our Supreme Court has further described breaking or entering:

In order to convict under [N.C. Gen. Stat. § 14-54] the state must show that defendant did break or enter a building unlawfully. Where defendant enters a building with the consent of the owner or anyone empowered to give effective consent to enter, such entry cannot be the basis for a conviction of breaking or entering. Conversely, a wrongful entry, *i.e.* without consent, will be punishable under this section.

State v. Locklear, 320 N.C. 754, 758, 360 S.E.2d 682, 684 (1987) (internal citations omitted).

Defendant argues the evidence was insufficient to show that her entry into the law firm was unauthorized or wrongful, given that she entered the firm during regular business hours and the firm was open to the public. This Court already addressed this argument when considering the appeal of Steven Brooks. *State v. Brooks*, 178 N.C. App. 211, 631 S.E.2d 54 (2006). Like defendant in this case, Brooks argued that the State had failed to prove an unlawful entry because he entered a law office that was open to members of the public. In rejecting this argument, we explained that even if an entry is initially legal, "subsequent conduct of the entrant may render the consent to enter void *ab initio*." *Id.* at 214, 631 S.E.2d at 57. Applying this principle to Brooks, we wrote:

In the instant case, the evidence tended to show that defendant entered a law office which was open to members of the public seeking legal assistance. The firm had a reception area where

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members of the public were generally welcome and also areas beyond this reception area which were not open to the public. When defendant entered the reception area of the firm, he did so with implied consent from the firm. However, defendant took action which rendered this consent void *ab initio* when he went into areas of the firm that were not open to the public so that he could commit a theft, and when he misinformed a member of the firm as to the reason for his presence in these areas. Therefore, defendant illegally entered the firm.

Id. at 215, 631 S.E.2d at 57.

Our analysis in *Brooks* applies with equal force here. Defendant was spotted inside the law firm at two separate times on the morning of 18 August 2004. A jury could find, based on Mr. Grace's prohibiting defendant from coming to his office, that the first entry was nonconsensual. Even if that directive is disregarded, however, a jury could also reasonably find that defendant falsely told Mr. Grace that she was in the office to see a secretary in order to obtain access to the private areas of the law offices.

Further, when defendant was spotted the second time in the law offices, she was no longer in the public reception area, but in a back hallway of the nonpublic space reserved for firm employees. Defendant explained that she was merely accompanying the man in the jersey also seen walking in the nonpublic area of the office, an explanation inconsistent with her earlier statement to Mr. Grace that she needed to see a secretary at the firm. As in *Brooks*, this evidence showed that defendant ventured into the nonpublic space of the office and gave a false explanation for her presence. In accord with our decision in *Brooks*, we hold that such evidence was sufficient to permit a jury to find that defendant committed an unlawful breaking or entering.

Since defendant's own entries into the law offices were sufficient to defeat her motion to dismiss the breaking or entering charge, we need not address her argument that the State failed to present substantial evidence that defendant acted in concert with Brooks to enter Ms. Clough's personal office without consent. Further, we also need not address defendant's contention that there was insufficient evidence to show an intent to commit larceny because of our holding, discussed below, that the guilty verdict on misdemeanor breaking or entering must be reinstated.

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[4] Turning finally to the larceny charge, “[t]he essential elements of larceny are that defendant (1) took the property of another; (2) carried it away; (3) without the owner’s consent; and (4) with the intent to permanently deprive the owner of the property.” *State v. Coats*, 74 N.C. App. 110, 112, 327 S.E.2d 298, 300, *cert. denied*, 314 N.C. 118, 332 S.E.2d 492 (1985). “The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is committed pursuant to a breaking or entering in violation of section 14-54 of the General Statutes.” *Brooks*, 178 N.C. App. at 215, 631 S.E.2d at 57.

Here, the State relied upon the theory that defendant acted in concert with Brooks with respect to the larceny charge. “Under the doctrine of acting in concert, if two or more persons act together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan.” *State v. McCullers*, 341 N.C. 19, 29-30, 460 S.E.2d 163, 169 (1995) (quoting *State v. Abraham*, 338 N.C. 315, 328-29, 451 S.E.2d 131, 137 (1994)).

Based on the evidence offered at trial, we believe that a jury could reasonably determine that defendant acted in concert with Steven Brooks to commit larceny. In the morning, defendant and Brooks were both found in the private section of the law office without permission, conduct that the jury could view as preparations for the larceny. Later, a man matching Brooks’ description was seen coming out of Ms. Clough’s office, where her day planner had been left. Very shortly thereafter, defendant, accompanied by Brooks, was using Ms. Clough’s credit cards at the Food Lion. Defendant ultimately admitted that she had been given the cards by “Steve.” Defendant also led police to a wooded area where the stolen day planner was recovered, and the missing cards were found at the same house where defendant and Brooks were both found and arrested. This is substantial evidence that defendant and Brooks acted together in pursuit of a common plan or purpose and that defendant is, therefore, guilty of larceny, even though the breaking or entering to steal the credit cards was actually committed by Brooks. See *State v. Dow*, 70 N.C. App. 82, 86, 318 S.E.2d 883, 886 (1984) (holding that “jury could reasonably find that defendant committed the offense[] of larceny . . . by reason of aiding and abetting or acting in concert” where evidence showed that two accomplices entered store while defendant remained outside in car with motor running; accomplices exited store with stolen property; and all three men were later appre-

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hended in same vehicle along with stolen items). The trial court, therefore, properly denied defendant's motion to dismiss.

III. Validity and Consistency of the Verdicts

[5] In one assignment of error, defendant argues that the trial court should have accepted the initial guilty verdict for misdemeanor breaking or entering and erred by ordering the jury to reinitiate deliberations. In a related assignment of error, defendant argues that the jury's verdict on misdemeanor breaking or entering in turn precluded defendant's conviction of felony larceny and instead required entry of judgment on misdemeanor larceny. We agree that the trial court erred in ordering the jury to redeliberate. We disagree, however, with defendant's contention that the initial verdicts were legally incompatible and required that judgment be entered on misdemeanor larceny.

“When and only when, an incomplete, imperfect, insensible, or repugnant verdict, or a verdict which is not responsive to the issues or indictment is returned, the court may decline to accept it and direct the jury to retire, reconsider the matter, and bring in a proper verdict.” *State v. Sumner*, 269 N.C. 555, 557, 153 S.E.2d 111, 112 (1967) (quoting *State v. Perry*, 225 N.C. 174, 176, 33 S.E.2d 869, 870 (1945)). The Supreme Court in *Sumner* went on to explain:

While the general rule is that a verdict is not complete until it is accepted by the court, nevertheless the rule seems to be that if a proper verdict is returned, one that is permissible under the charge and complete in itself . . . the court should have accepted it and directed its entry into the records as the verdict of the jury.

Id., 153 S.E.2d at 112-13 (internal citations omitted). The question before this Court, therefore, is whether the initial verdicts as to misdemeanor breaking or entering and felony larceny were permissible under the charge and complete in themselves.

In this case, the State offered evidence of three separate entries into the law firm. Defendant was involved in the first two entries in the morning, during a time frame when Ms. Clough's day planner was not on the premises and, therefore, could not have been stolen. Defendant was not seen at the firm the rest of that day. The third entry, later in the afternoon, after Ms. Clough had left her day planner in her office, was accomplished by a man matching Brooks' description. As we concluded above, in connection with the motion to dis-

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miss, a jury could reasonably find that defendant had committed an unauthorized entry into the firm during the morning. In addition, however, the jury could also have reasonably decided that the State failed to prove defendant's intent to commit a larceny when she entered the firm that morning. For that reason, the jury could—as it did—appropriately find defendant guilty of misdemeanor breaking or entering based on her morning entries.

[6] Contrary to the trial court's and defendant's reasoning, a guilty verdict on misdemeanor breaking or entering did not, given the evidence in this case, necessarily preclude the jury from convicting defendant of felony larceny. When a jury is instructed that a defendant may be guilty of felony larceny because she acted in concert with another individual following a breaking or entering, a conviction for felony larceny is legitimate even though the defendant may be found not guilty of felony breaking or entering. *See State v. Pearcy*, 50 N.C. App. 210, 211, 272 S.E.2d 610, 611 (1980) (in considering “whether a defendant who is tried for acting in concert with others to commit felonious larceny, after a felonious breaking or entering, may be convicted of felonious larceny if the jury does not reach a verdict as to the felonious breaking or entering[,]” this Court held the jury could find defendant did not act in concert with others to break or enter, but did act in concert to commit larceny), *disc. review denied*, 302 N.C. 400, 279 S.E.2d 355 (1981). *See also State v. Curry*, 288 N.C. 312, 317-19, 218 S.E.2d 374, 377-78 (1975) (guilty verdict on felony larceny not inconsistent with acquittal of felony breaking or entering where defendant is tried on theory of aiding and abetting principal perpetrators); *State v. Marlowe*, 73 N.C. App. 443, 446, 326 S.E.2d 351, 353 (1985) (applying *Pearcy* and *Curry* to conclude that guilty verdict on felony larceny not inconsistent with acquittal of felony breaking or entering when defendant is tried on theory of acting “together” with others).

Here, the jury could have determined that defendant did not act in concert with respect to the afternoon entry into Ms. Clough's office, but that she did act in concert with respect to the larceny. In light of *Curry*, *Pearcy*, and *Marlowe*, the jury's initial verdicts on the breaking or entering and larceny counts were thus permissible under the charge and complete. The trial court erred in refusing to accept the verdicts as originally rendered.

We must, therefore, vacate defendant's conviction of felony breaking or entering, and remand for entry of judgment upon the orig-

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inal verdict of misdemeanor breaking or entering and for resentencing. We find no error with respect to the felony larceny conviction.

IV. Motion for Mistrial

[7] Lastly, we consider defendant's argument that the trial court should have granted her motion for a mistrial. The transcript reveals that the following events took place during the trial. While riding in the courthouse elevator, defendant whispered to a juror standing near her that she was innocent. Upon learning of this incident, the trial judge described defendant's conduct as "highly improper," discharged the juror to whom defendant had whispered, and substituted the lone alternate.

Later, defendant was discussing her case with her attorney prior to court commencing one morning, when she decided to leave the courthouse. As defense counsel later explained to the trial judge, he was trying to persuade defendant to stay in court when "she bolted" and headed into a stairwell. Defense counsel followed her, hollering: "Janie, come back up here. Come on. We've got to get on with it." A member of the jury ("Mr. Johnson") also happened to be in the stairwell during this incident.

When later questioned by the judge, in the presence of the other eleven jurors, Mr. Johnson stated that he saw defendant and her counsel in the stairwell and overheard defendant say "she wasn't coming back in here, something like that." The trial judge then asked Mr. Johnson whether he could remain fair and impartial despite having witnessed this episode in the stairwell. Mr. Johnson indicated that he could. Before resuming the trial, the judge polled the entire jury, inquiring whether each juror could remain fair and impartial. The jurors all asserted that they could remain fair and impartial.

Out of the presence of the jury, defendant argued that Mr. Johnson must be dismissed from the jury panel and moved for a mistrial. At this point, removal of Mr. Johnson would necessarily have resulted in a mistrial, as no alternate jurors were available. On appeal, defendant argues the trial court should have declared a mistrial because Mr. Johnson not only overheard defendant's remark that she was leaving her own trial, but he reported this in the presence of the whole jury.

N.C. Gen. Stat. § 15A-1061 (2005) provides that a judge, "[u]pon motion of a defendant or with his concurrence . . . may declare a mistrial at any time during the trial." The statute mandates that

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“[t]he judge must declare a mistrial upon the defendant’s motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.” N.C. Gen. Stat. § 15A-1061.

Our Supreme Court has held that “ ‘[a] mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant’s case and make it impossible for the defendant to receive a fair and impartial verdict.’ ” *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991) (quoting *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990)). The decision on a motion for mistrial is committed to the sound discretion of the trial court, and the decision will not be overturned on appeal unless an abuse of discretion is shown. *State v. Johnson*, 341 N.C. 104, 114, 459 S.E.2d 246, 252 (1995).

While it would have been the much better practice for the trial judge to interview Mr. Johnson individually, rather than in front of the entire jury, a review of the record indicates that the trial court nonetheless acted within its discretion in denying the motion for a mistrial. The situation was of defendant’s own making. She chose to flee from the trial after announcing her intentions in the public stairwell. Further, the lack of an alternate to substitute for Mr. Johnson was a direct consequence of defendant’s inappropriate remarks to a juror. It is well established that arguments for a mistrial do not carry great weight when the grounds relied upon arise from a defendant’s own misconduct. See *State v. Marino*, 96 N.C. App. 506, 507, 386 S.E.2d 72, 73 (1989) (where defendant moved for a mistrial after his own open-court “profane outburst,” Court found no error in denial of motion because “[i]f defendant was prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain”).

Since the jurors each indicated, upon polling by the trial court, that they could remain fair and impartial, we cannot conclude that the trial court abused its discretion in denying the motion for a mistrial based on circumstances caused by defendant’s own misconduct. See *Johnson*, 341 N.C. at 114, 459 S.E.2d at 252 (“trial court did not abuse its discretion in denying defendant’s motion for a mistrial” where the “trial court gave corrective instructions to the jurors about th[e] incident and questioned them in order to determine if they were still able to give defendant a fair trial”). We therefore overrule this assignment of error.

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Vacated and remanded in part; no error in part.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

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PLAINTIFFS v. RUTHERFORD COUNTY, BY AND THROUGH THE RUTHERFORD
COUNTY BOARD OF COMMISSIONERS, DEFENDANT

No. COA06-68

(Filed 2 January 2007)

1. Building Codes— office building permit—moratorium on rock quarry—tolling statutory time for resuming construction

The trial court's entry of summary judgment for defendant county upholding a moratorium on heavy industry within 2000 feet of a public school and enjoining plaintiff landowner from operating a rock quarry on the property, and plaintiff landowner's appeal therefrom, tolled the statutory time period under which plaintiff could resume construction pursuant to a building permit for an office building to be used in conjunction with a rock quarry on the property, even though defendant county took no action based upon the moratorium to revoke the building permit, and plaintiff's building permit has not expired, because the summary judgment prohibited plaintiff from continuing construction pursuant to its building permit for a building to be used with the rock quarry. N.C.G.S. § 153A-358.

2. Building Codes; Zoning— office building permit—vested right—no vested right for rock quarry

Although a valid building permit for an office building on plaintiff landowner's property gave plaintiff a vested right under N.C.G.S. § 153A-344(b) to build an office building that plaintiff intended to use in conjunction with the operation of a rock quarry on the property, the building permit did not give plaintiff a statutory vested right to operate a rock quarry on the property after an ordinance prohibiting the quarry was enacted.

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Appeal by Plaintiffs and by Defendant from order entered 7 December 2005 by Judge Forrest Donald Bridges in Superior Court, Rutherford County. Heard in the Court of Appeals 23 August 2006.

Kennedy Covington Lobdell & Hickman, L.L.P., by Roy H. Michaux, Jr. and Ann M. Anderson, for Plaintiffs.

Sigmon, Clark, Mackie, Hutton, Hanvey, & Ferrell, P.A., by Warren A. Hutton, Forrest A. Ferrell and Stephen L. Palmer; and Nanney, Dalton & Miller, L.L.P., by Walter H. Dalton and Elizabeth Thomas Miller, for Defendant.

MCGEE, Judge.

Sandy Mush Properties, Inc. (Sandy Mush) and Florida Rock Industries, Inc. (Florida Rock) (collectively Plaintiffs) and Rutherford County, by and through the Rutherford County Board of Commissioners (Defendant), appeal an order for summary judgment filed 7 December 2005. In its order for summary judgment, the trial court set forth the following procedural and factual history of the case, which the parties do not contest.

Sandy Mush owns a 180-acre tract of land in Rutherford County (the property), which it leased in July 2000 to Hanson Aggregates Southeast, Inc. (Hanson) for the operation of a crushed stone rock quarry. A portion of the property is within 2,000 feet of a school boundary. Hanson applied to the State for a mining permit for the property in September 2000, and the State eventually granted a mining permit to Hanson in March 2002. Hanson applied to Defendant's building department on 26 June 2001 for building permits to construct on the property a modular office building, an office building, and a metal building. Defendant's building department denied Hanson's applications.

Defendant enacted a Polluting Industries Development Ordinance (the moratorium) on 2 July 2001, which imposed a moratorium on the operation of new or expanded heavy industry within 2,000 feet of a church, school, residence or other structure. Hanson renewed its applications for building permits on 31 August 2001, after meeting the requirements that caused the initial denial of the applications. Defendant again denied Hanson's applications when Hanson refused to certify that the buildings would not be used in conjunction with a quarry on the property, which was a heavy industry prohibited by the moratorium.

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Hanson filed a complaint against Defendant requesting a writ of mandamus to direct Defendant to issue the building permits and seeking an injunction to prevent Defendant from enforcing the moratorium against Hanson. The trial court ruled on 28 September 2001 that Defendant was enjoined from enforcing the moratorium and ordered Defendant to grant the building permits to Hanson. Defendant issued the building permits to Hanson on 1 October 2001. Later that day, Defendant enacted the School Zone Protective Ordinance (the ordinance), which prohibited heavy industries within 2,000 feet of a primary or secondary school property boundary in Rutherford County. Defendant enacted the ordinance after notice and publication pursuant to the North Carolina General Statutes.

Hanson commenced construction on an office building on the property in October 2001 and continued construction until 20 December 2001, at which time it ceased construction. Defendant received a request from the State regarding Hanson's application for an air quality permit for the proposed quarry, and Defendant responded that Hanson's proposed quarry violated the ordinance.

Defendant filed a motion for summary judgment and noticed it for hearing on 1 July 2002. At the hearing, Sandy Mush appeared and announced that it was willing to be substituted for Hanson and that Sandy Mush ratified all of Hanson's claims. In an assignment of rights and relinquishment of leasehold interest entered 1 July 2002, Hanson and Sandy Mush terminated Hanson's lease of the property and Hanson assigned

all of its right, title and interest, including its grandfathered or vested rights, and in and to all permits issued to it or applied for by it, including but not limited to all building or other permits issued by Rutherford County, North Carolina, and all surface mining, water quality or air quality permits or applications issued to or filed by Hanson It is the intention to assign these rights to Sandy Mush . . . as fully and as completely as possible, to the maximum extent allowed by law.

In an order entered 8 August 2002, the trial court substituted Sandy Mush for Hanson, and Sandy Mush later moved for summary judgment. The trial court entered an order for summary judgment on 25 August 2002, dissolving the writ of mandamus, granting Defendant's motion for summary judgment, and denying Sandy Mush's motion for summary judgment.

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Sandy Mush appealed to this Court and we filed an opinion on 21 October 2003. However, this Court allowed Defendant's petition for rehearing and issued an opinion, which superseded the first opinion, on 4 May 2004. In *Sandy Mush Props., Inc. v. Rutherford Cty.*, 164 N.C. App. 162, 595 S.E.2d 233 (2004), our Court held that the moratorium was invalid because the defendant Rutherford County had failed to comply with the applicable notice requirements. *Id.* at 167-68, 595 S.E.2d at 236-37. Therefore, our Court held:

Although the [defendant] subsequently complied with those requirements before adopting the [ordinance], [the] defendant[] had already been ordered to issue Hanson a building permit because the moratorium was an invalid exercise of the [defendant's] police powers. [The] [p]laintiff, as the owner of the Property and the party properly substituted for Hanson in this action, is now therefore entitled to that permit. Accordingly, we reverse the trial court's denial of [the] plaintiff's summary judgment motion and its grant of summary judgment in favor of [the] defendant[].

Id. at 168, 595 S.E.2d at 237.

Sandy Mush informed Defendant on 7 July 2004 that it planned to resume construction under its building permit on 14 July 2004. Defendant notified Sandy Mush on 15 July 2004 that the building permit had expired. Plaintiffs filed a complaint for declaratory and injunctive relief on 6 August 2004. Plaintiffs alleged that Florida Rock held an option agreement and a mineral agreement and lease with regard to the property. Plaintiffs sought a declaration and an injunction allowing them to continue construction of the office building on the property, or in the alternative, an order tolling the period for the expiration of the permit pending a final decision. Plaintiffs attached a copy of the office building permit to the complaint.

The trial court entered an order on 17 August 2004, denying Plaintiffs' request to resume construction under the building permit, but ordering that "[t]he period available for . . . [P]laintiffs to continue construction, if any such period has not already expired, under the October 1, [2001] permit is hereby tolled from and after July 13, 2004 pending a final decision in this cause." Plaintiffs filed an amended complaint on 8 October 2004 seeking a determination that Plaintiffs had statutory and common law vested rights to use the property for a quarry. Plaintiffs filed a motion for partial summary judgment regard-

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ing the validity of the building permits and Plaintiffs' statutory vested right to use the property as a quarry.

In its summary judgment order filed 7 December 2005, the trial court found that “[b]oth parties to this action acknowledge that the issue relating to common law vested rights involves questions of fact that would require a jury trial, if that issue is necessary for disposition of the case.” The trial court then made the following conclusions of law:

1. The 12-month statutory period prescribed under N.C.G.S. § 153A-358 for continuing the validity of a building permit issued on October 1, 2001 was tolled by the August 25, 2002 Summary Judgment; such period, therefore, has not expired and the building permit is valid.
2. Subsequent to the effective date of the . . . [o]rdinance, use of the property for mining and rock quarrying was no longer consistent with local zoning ordinances.
3. Notwithstanding the previous issuance of a building permit for the construction of certain buildings which were to be used ancillary to a mining and rock quarry operation on the property, the issuance of the building permit did not create a statutory vested right giving . . . Plaintiffs a right to mine and quarry the property.

The trial court granted summary judgment for Plaintiffs regarding “the validity of the building permit(s)” and summary judgment for Defendant as to the issue of a statutory vested right to use the property as a quarry. The trial court also ordered that “[a]lthough Summary Judgment is final as to fewer than all the claims addressed in . . . Plaintiffs’ Complaint, there is no just reason for delay and the [Trial] Court determines that this decision is appropriate for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.” Plaintiffs and Defendant appeal.

Defendant’s Appeal

[1] Defendant argues the trial court erred by granting summary judgment for Plaintiffs regarding the validity of the building permits issued by Defendant to Hanson. Defendant argues the building permits expired when Hanson discontinued work authorized by the permits for a period of twelve months. However, Plaintiffs contend the period of time in which to resume work under the permits was tolled

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during the pendency of Sandy Mush's appeal from the trial court's 25 August 2002 summary judgment order. We agree with Plaintiffs with respect to the office building permit.

On appeal of a summary judgment ruling, our Court must determine "whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law." *Allstate Ins. Co. v. Lahoud*, 167 N.C. App. 205, 207, 605 S.E.2d 180, 182 (2004), *aff'd per curiam*, 359 N.C. 628, 614 S.E.2d 304 (2005). The moving party bears the burden of showing there is no genuine issue of material fact. *Id.* We view the evidence in the light most favorable to the non-movant. *Id.*

N.C. Gen. Stat. § 153A-358 (2005) provides:

A [building] permit issued pursuant to [N.C. Gen. Stat. §] 153A-357 expires six months, or any lesser time fixed by ordinance of the county, after the date of issuance if the work authorized by the permit has not commenced. If after commencement the work is discontinued for a period of 12 months, the permit therefor immediately expires.

It is undisputed that Defendant issued building permits to Hanson on 1 October 2001 for the construction of a modular office building, an office building and a metal building and that Hanson intended to use the buildings in conjunction with a proposed quarry on the property. It is also undisputed that Hanson commenced construction on the office building on 16 October 2001 and continued construction through 20 December 2001.¹ The trial court entered summary judgment for Defendant on 25 August 2002, upholding the moratorium on heavy industry within 2,000 feet of a public school. The trial court also dissolved the writ of mandamus and preliminary injunction. (199). The parties dispute the effect of the entry of summary judgment.

Defendant argues that while the trial court's 25 August 2002 summary judgment order enjoined Plaintiffs from operating a quarry on

1. We note that the parties have not argued the validity of Plaintiffs' permits to construct the modular office and the metal building in that those permits expired approximately 1 April 2002 since Plaintiffs never commenced construction under those permits. See N.C.G.S. § 153A-358 (stating that a building permit issued pursuant to N.C. Gen. Stat. § 153A-357 "expires six months, or any lesser time fixed by ordinance of the county, after the date of issuance if the work authorized by the permit has not commenced.").

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the property, it did not revoke or invalidate the building permits issued to Hanson. Defendant argues that “[t]o invalidate the permits, [Defendant] would have [had] to take additional action based on the Moratorium to revoke them. [Defendant], however, chose not to do so and instead allowed the permits to remain in full force and effect.” Therefore, Defendant argues, the building permits expired approximately 20 December 2002, a year after Hanson ceased construction on the property.

Although the office building permit issued by Defendant did not authorize the construction of a quarry on the property, it is undisputed that Plaintiffs intended to use the permitted building in conjunction with a quarry. Because the trial court’s summary judgment order upheld the moratorium that prohibited Plaintiffs from operating the proposed quarry, the order effectively prohibited Plaintiffs from continuing construction pursuant to their building permit. Furthermore, it would have been nonsensical for Plaintiffs to continue construction when Defendant could have prohibited construction at any time. Moreover, our Court determined in *Sandy Mush Properties, Inc.*, that Sandy Mush “is now therefore entitled to that permit.” *Sandy Mush Props., Inc.*, 164 N.C. App. at 168, 595 S.E.2d at 237. That holding demonstrated that Plaintiffs had previously been precluded from continuing construction under their building permit and, therefore, the statutory time period for resumption of construction had been tolled pending Sandy Mush’s appeal from the 25 August 2002 summary judgment order. Therefore, we conclude that the trial court’s 25 August 2002 summary judgment order tolled the time period for resumption of construction under Plaintiffs’ office building permit pursuant to N.C.G.S. § 153A-358.

Defendant relies on *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 504 S.E.2d 296 (1998), *disc. review denied*, 350 N.C. 93, 527 S.E.2d 665 (1999). In *Estates, Inc.*, the petitioner Estates, Inc. contracted to purchase a 34-acre tract of real property from the petitioner Timberlyne Investment Co., LLC. *Id.* at 665, 504 S.E.2d at 297-98. Because Estates, Inc. wanted to build a “Planned Development for Housing” on the land, it was required to obtain a special use permit from the Chapel Hill Town Council (the Town Council). *Id.* at 665, 504 S.E.2d at 298.

The petitioners applied for a special use permit and the Town Council denied the application. *Id.* The petitioners filed a petition for certiorari with the trial court. *Id.* Several property owners in the

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vicinity of the proposed development filed a motion to intervene, which the trial court granted. *Id.* The trial court reversed the decision of the Town Council and directed the Town Council to approve the petitioners' application and issue the permit. *Id.* Pursuant to the trial court's mandate, the Town Council issued the special use permit to the petitioners. *Id.*

The intervenors appealed the decision of the trial court and the petitioners moved to dismiss the appeal. *Id.* In support of their motion, the petitioners argued "that because [the] intervenors did not act to prevent the Town Council from issuing the permit in compliance with the [trial] court's mandate, the questions raised in [the] intervenors' appeal [were] moot." *Id.* at 666, 504 S.E.2d at 298.

Our Court cited Rule 62(a) of the North Carolina Rules of Civil Procedure, which provides:

"Except as otherwise stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."

Id. at 666-67, 504 S.E.2d at 298-99 (quoting N.C.R. Civ. P. 62(a)). Our Court held that because the trial court sat as an appellate court, the trial court's "order to the Town Council to grant the special use permit was an appellate court's mandate to a lower tribunal, not an injunction." *Id.* at 667, 504 S.E.2d at 299. Therefore, "an automatic stay against proceedings to enforce the [trial] court's mandate arose when the order was entered on 15 May 1997. The stay lasted until the time to file notice of appeal expired on 16 June 1997." *Id.* at 667-68, 504 S.E.2d at 299. However, the stay did not prohibit the Town Council from complying with the order voluntarily, which the Town Council did. *Id.* at 668, 504 S.E.2d at 299. Our Court recognized that

[a] reversal of the [trial] court's ruling by this Court would have the limited effect of affirming the [Town] Council's initial denial of [the] petitioners' request for a special use permit. It would do nothing to invalidate the permit later issued voluntarily by the [Town] Council pursuant to the [trial] court's mandate.

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Id. at 668, 504 S.E.2d at 300. Because the relief sought by the intervenors could no longer be granted, our Court held that “[t]he issues raised in [the] intervenor[s’] appeal are . . . moot, and we will not address them.” *Id.* at 669, 504 S.E.2d at 300.

In the present case, Defendant argues that its

decision not to revoke the permits issued to Hanson is as equally a voluntary action as the Town of Chapel Hill’s issuance of a special use permit prior to being compelled to do so [in *Estates, Inc.*]. . . . By choosing not to revoke the permits previously mandated by the court, [Defendant in the present case] adopted the issuance of the permits as its own volitional act.

Therefore, “the reversal of the August 25, 2002 Summary Judgment had no effect on the permits issued by [Defendant].”

However, *Estates, Inc.* is inapplicable to the present case. *Estates, Inc.* involved the issue of mootness. The intervenors were appealing the reversal of the Town Council’s decision to deny the special use permit when the permit had already been issued voluntarily by the Town Council. *Estates, Inc.*, 130 N.C. App. at 668-69, 504 S.E.2d at 299-300. In the present case, the issue is whether the 25 August 2002 summary judgment order, and the appeal therefrom, tolled the operation of N.C.G.S. § 153A-358. Accordingly, *Estates, Inc.* has no application to the present case.

We conclude the trial court’s 25 August 2002 summary judgment order, and Sandy Mush’s appeal therefrom, tolled the statutory time period in which Plaintiffs could resume construction under their office building permit. Therefore, we affirm the trial court’s grant of summary judgment for Plaintiffs on this issue to the extent the trial court ruled that the office building permit had not expired.

Plaintiffs’ Appeal

[2] Plaintiffs argue the trial court erred by granting summary judgment for Defendant on the issue of a statutory vested right for the operation of a quarry on the property. Plaintiffs contend that pursuant to N.C. Gen. Stat. § 153A-344(b), they acquired a statutory vested right to mine the property by virtue of the building permits issued to Hanson by Defendant. Plaintiffs further argue that their vested right was unaffected by the subsequent enactment of the ordinance.

N.C. Gen. Stat. § 153A-344(b) (2003) establishes a statutory vested right for certain buildings and uses as follows:

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Amendments, modifications, supplements, repeal or other changes in zoning regulations and restrictions and zone boundaries shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 153A-357 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 153A-358 and unrevoked pursuant to G.S. 153A-362 or (ii) a vested right has been established pursuant to G.S. 153A-344.1 and such vested right remains valid and unexpired pursuant to G.S. 153A-344.1.

While Plaintiffs cite the current version of N.C.G.S. § 153A-344(b), which no longer contains the words “modifications, supplements, repeal or other changes[,]” this statutory change was not effective until 1 January 2006. Therefore, the earlier version of the statute, as cited above, applies.

We must apply the plain language of the statute to determine whether Plaintiffs are entitled to a statutory vested right to mine the property. In the present case, as stated above, the only building permit that remains valid is the office building permit and it is the only permit that could give rise to a vested right to mine the property.

Because the statute provides a statutory vested right “with regard to *buildings* . . . for which . . . building permits have been issued[,]” N.C.G.S. § 153A-344(b) (emphasis added), and the office building permit was issued before enactment of the ordinance, we hold that Plaintiffs obtained a statutory vested right to the office building. Plaintiffs argue further, however, that they are entitled to a statutory vested right to mine the property by virtue of that permit. We disagree. While the statute also provides a statutory vested right “with regard to . . . *uses* for which . . . building permits have been issued[,]” N.C.G.S. § 153A-344(b) (emphasis added), the office building permit was not issued to authorize the use of the property as a quarry. Rather, the building permit only authorized the construction of the office building. The proposed use of the office building, as stated in the building permit, was “NOOB, OFFICE, BANKS & PROFESSION.”

Plaintiffs cite *Simpson v. City of Charlotte*, 115 N.C. App. 51, 443 S.E.2d 772 (1994), in which the City of Charlotte’s zoning ordinance “allowed a quarry to be established in any zoning district, including residential districts, subject to certain requirements.” *Id.* at 53, 443 S.E.2d at 774. The respondent filed an application for a permit for the

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construction and operation of a quarry on land zoned light industrial, general industrial, and multi-family. *Id.* Charlotte's zoning administrator issued a quarry permit to the respondent. *Id.* The Charlotte City Council later approved an amendment to the City's zoning ordinance, which limited quarries to general industrial districts. *Id.*

The petitioner, an owner of multi-family and industrial-zoned real property in the vicinity of the respondent's proposed quarry, appealed the zoning administrator's decision to the Zoning Board of Adjustment (the Board). *Id.* The Board concluded that the zoning administrator had properly granted the permit to the respondent under the pre-amendment zoning ordinance. *Id.* The Board also concluded that the permit issued to the respondent was a building permit and that by virtue of the permit, the respondent had obtained a statutory vested right to the quarry permit pursuant to N.C. Gen. Stat. § 160A-385(b). *Id.* at 56-57, 443 S.E.2d at 776.

The petitioner filed a petition for writ of certiorari with the trial court and the trial court concluded that the respondent had complied with the City's pre-amendment zoning ordinance and that the permit was properly issued. *Id.* at 53, 443 S.E.2d at 774. The trial court also affirmed the Board's conclusion that the respondent had obtained a statutory vested right to the quarry permit. *Id.* at 57, 443 S.E.2d at 776. However, the trial court determined that the pre-amendment zoning ordinance violated a statute that required zoning regulations to promote the "health, safety, morals, or the general welfare of the community[,]" and therefore ruled that the permit was null and void. *Id.* at 53, 443 S.E.2d at 774 (quoting N.C. Gen. Stat. § 160A-381 (1987)).

The respondent appealed and the petitioner cross-appealed the trial court's holding that the respondent had a vested right to the quarry permit. *Id.* Our Court held the trial court erred by concluding that the permit issued to the respondent was null and void because the validity of the zoning ordinance had not been before the trial court. *Id.* at 55, 443 S.E.2d at 775. Regarding the petitioner's cross-appeal, the petitioner assigned error to the trial court's conclusion that the respondent had a statutory vested right to the quarry permit. *Id.* The petitioner argued that "after [the] amendment was adopted by the City Council, [the] respondent's permit allowing the operation of a quarry in a residential district was no longer valid." *Id.*

Our Court interpreted N.C. Gen. Stat. § 160A-385(b), which applies to municipalities and is the identical counterpart to N.C.G.S.

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§ 153A-344(b), which is applicable to counties. Our Court quoted N.C. Gen. Stat. § 160A-385(b) as follows:

“Amendments, modifications, supplements, repeal or other changes in zoning regulations and restrictions and zone boundaries shall not be applicable or enforceable without consent of the owner with regard to buildings and uses for which either (i) building permits have been issued pursuant to G.S. 160A-417 prior to the enactment of the ordinance making the change or changes so long as the permits remain valid and unexpired pursuant to G.S. 160A-418 and unrevoked pursuant to G.S. 160A-422 or (ii) a vested right has been established pursuant to G.S. 160A-385.1 and such vested right remains valid and unexpired pursuant to G.S. 160A-385.1.”

Id. at 56, 443 S.E.2d at 776 (quoting N.C. Gen. Stat. § 160A-385(b) (Cum. Supp. 1993)).

Our Court recognized that N.C. Gen. Stat. § 160A-417(a) required a building permit to contain a provision that the “‘work done shall comply with the State Building Code and all other applicable State and local laws.’” *Id.* at 57, 443 S.E.2d at 776 (quoting N.C. Gen. Stat. § 160A-417(a) (Cum. Supp. 1993)). The respondent’s permit, however, did not contain such a provision and, also, the zoning administrator referred to the permit as a zoning permit in the notice sent to adjoining property owners. *Id.* Therefore, our Court held that the permit issued to the respondent was not a building permit, and the respondent therefore did not obtain a statutory vested right to operate a quarry under N.C.G.S. § 160A-385(b). *Id.*

In the present case, the office building permit obtained by Hanson did contain the provision that “all work will comply with the State Building Code and all other applicable State and Local laws and ordinances and regulations.” Therefore, the office building permit in the present case complied with N.C. Gen. Stat. § 153A-357 (2005), which requires such a provision to be included in building permits issued by counties. Although Defendant argues the permit expired, Defendant does not otherwise contest the validity of the building permit. Therefore, unlike in *Simpson*, the permit in the present case was a valid building permit as defined by N.C.G.S. § 153A-357.

However, simply because the permit at issue in the present case was a building permit, unlike in *Simpson*, does not mandate the conclusion that Plaintiffs obtained a statutory vested right to mine the

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property by virtue of that permit. *Simpson* was limited to a determination that the quarry permit issued in that case did not qualify as a building permit. *Simpson* did not deal with any other requirements for the establishment of a statutory vested right, as we do here. In the present case, the office building permit was issued to authorize the construction of a building on the property, not to authorize the use of the property as a quarry. Therefore, *Simpson* is inapplicable to the present case. We affirm the trial court on this issue.

Affirmed.

Judges BRYANT and ELMORE concur.

STATE OF NORTH CAROLINA v. DONNAVAN KEITH BLAIR, DEFENDANT

No. COA06-515

(Filed 2 January 2007)

1. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant contends there was insufficient evidence that he took property by use or threatened use of a dangerous weapon and he endangered or threatened the victim's life with a dangerous weapon, because: (1) although the victim did not see defendant's knife until defendant was taken into custody, an officer who witnessed the incident testified that defendant, while holding a knife in his right hand and the recently stolen wallet in his left hand, threatened to harm the victim immediately after a short chase through the streets; (2) the officer testified he first saw the knife in defendant's hand right after defendant stood up after pushing the victim and taking his wallet; and (3) while defendant testified that he was holding a crack pipe and not a knife in his hand, this contradiction is a matter for the jury to decide.

2. Robbery— dangerous weapon—denial of requested instruction—mere possession of dangerous weapon

The trial court did not err in a robbery with a dangerous weapon case by denying defendant's request for a special jury

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instruction about mere possession of a dangerous weapon, because: (1) the evidence does not support defendant's contention that he merely possessed a knife while stealing the victim's wallet; (2) defendant was seen holding a knife at the time he pushed the victim and took the wallet, and was further seen threatening the victim while holding the wallet in one hand and a knife in the other; (3) the trial court gave the pattern jury instruction stating that the jury must find that defendant obtained the property by endangering or threatening the life of that person with the dangerous weapon; and (4) the trial court's instruction informed the jury in substance that mere possession of the weapon was not enough and defendant must have used the weapon to endanger or threaten the life of the victim.

3. Evidence— prior crimes or bad acts—detailed cross-examination—opening the door

The trial court did not err or commit plain error in a robbery with a dangerous weapon case by admitting the State's detailed cross-examination of defendant regarding prior charges and convictions, because: (1) during direct examination, defendant minimized the seriousness of his criminal involvement when he claimed that he was not a violent person and had never robbed anyone; (2) defendant's testimony opened the door to the State's questioning as to defendant's past criminal history; and (3) when the questioning seemed to move beyond the purposes allowable under N.C.G.S. § 8C-1, Rule 609(a), defendant's objection was sustained.

4. Evidence— hearsay—prior consistent statements

The trial court did not commit plain error in a robbery with a dangerous weapon case by admitting alleged noncorroborative inadmissible hearsay evidence of an officer about what the victim said immediately following the robbery, because: (1) contrary to defendant's assertion, the officer's testimony does not contradict the victim's testimony; (2) at no point during his testimony did the victim state that defendant did not push him down, but only that he could not remember whether he was pushed down by defendant; (3) other than that one detail, the officer's testimony as to the victim's statement taken shortly after the robbery was substantially similar to the victim's in-court testimony; and (4) the officer testified that he saw defendant push the victim onto the ground.

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5. Evidence— hearsay—reputation of neighborhood—not offered for truth of matter asserted

The trial court did not commit plain error in a robbery with a dangerous weapon case by admitting alleged inadmissible hearsay evidence about the neighborhood, because: (1) the officer's testimony that he was conducting surveillance of the area where the robbery occurred on 16 April 2005 based on the police receiving numerous complaints of prostitution, street-level drugs, larcenies, shoplifting, robberies, and assaults was elicited in response to the State's questioning of the officer as to why he was conducting surveillance in that area on that day; and (2) the testimony was not admitted for the truth of the matter asserted, but instead to explain why the officer was in a position to observe the robbery.

6. Constitutional Law— right to unanimous verdict—allegations of coerced verdict

The trial court did not improperly coerce a verdict in a robbery with a dangerous weapon case by instructing jurors at the conclusion of the charge that they must reach a unanimous verdict, because: (1) during its deliberations, the jury had several questions for the trial court but did not inquire about the consequences of its failure to reach a unanimous verdict; (2) the jury deliberated for less than two hours and never indicated it was divided; and (3) defendant failed to show the trial court's instruction that the jurors must all agree was an error absent which the jury probably would have returned a different verdict.

Appeal by defendant from a judgment dated 13 October 2005 by Judge William Z. Wood, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 6 December 2006.

Attorney General Roy Cooper, by Assistant Attorney General Kevin Anderson, for the State.

Linda B. Weisel for defendant-appellant.

BRYANT, Judge.

Donnavan Keith Blair (defendant) appeals from a judgment dated 13 October 2005 entered consistent with a jury verdict finding him guilty of robbery with a dangerous weapon. For the reasons below, we find defendant received a trial free of error.

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Facts

On 16 April 2005, at approximately 11:00 am, Mario Hernandez drove to a store in Winston-Salem, North Carolina to put air in his spare tire. As he bent over to inflate the tire, he put his wallet down on the ground beside him. Defendant approached Hernandez and said something Hernandez could not understand because he does not speak English. Defendant pushed Hernandez, grabbed Hernandez's wallet and ran. Hernandez chased defendant.

That same morning, Sergeant Michael Weaver of the Winston-Salem Police Department was parked across from the store in an unmarked vehicle and observed the incident. As defendant ran away from Hernandez, he ran right beside Sergeant Weaver's unmarked vehicle. Sergeant Weaver observed that defendant was carrying a wallet in his left hand and a knife in his right hand. Sergeant Weaver drove to a point where he anticipated he could intercept defendant, maneuvered in front of the chase and got out of his vehicle.

At this point Hernandez had caught up with defendant and defendant was turned around facing Hernandez. Defendant was walking backward, away from Hernandez, but toward Sergeant Weaver, with the wallet in his left hand and a knife in his right hand. Defendant, unaware that Sergeant Weaver was behind him, told Hernandez to "come and get it, I'll f— you up." Sergeant Weaver, drew his sidearm and instructed defendant to stop and drop the knife. Defendant then began to put the knife in his back right pocket, but was instructed to stop. Defendant was taken into custody and Hernandez's wallet was returned to him.

Procedural History

On 27 June 2005, the Forsyth County Grand Jury indicted defendant for robbery with a dangerous weapon. This charge was tried before a jury at the 10 October 2005, Criminal Session of Forsyth County Superior Court, the Honorable William Z. Wood, Jr., Judge presiding. On 13 October 2005, the jury returned a verdict finding defendant guilty of robbery with a dangerous weapon. The trial court entered a judgment consistent with the jury verdict dated 13 October 2005, sentencing defendant to 103 to 133 months in prison. Defendant appeals.

Defendant raises the issues of whether: (I) there is sufficient evidence to support defendant's armed robbery conviction; (II) the trial court erroneously denied defendant's special jury instruction request

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about mere possession of a dangerous weapon; (III) the trial court erroneously admitted the State's detailed cross-examination of defendant regarding prior charges and convictions; (IV) the trial court erroneously admitted non-corroborative inadmissible hearsay evidence; (V) the trial court erroneously admitted inadmissible hearsay evidence about the neighborhood; and (VI) the trial court erroneously coerced the verdict by instructing jurors they must reach a unanimous verdict.

I

[1] Defendant first argues his conviction for robbery with a dangerous weapon must be vacated because there is insufficient evidence he took property by use or threatened use of a dangerous weapon and he endangered or threatened the life of Hernandez with a dangerous weapon. Defendant moved to dismiss the charge on the ground of insufficient evidence at the close of the State's evidence and again at the close of all the evidence, both of which motions were denied by the trial court.

"[W]hen a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine 'whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.' " *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. A substantial evidence inquiry examines the sufficiency of the evidence presented but not its weight. The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence. Evidentiary contradictions and discrepancies are for the jury to resolve and do not warrant dismissal.

Garcia, 358 N.C. at 412-13, 597 S.E.2d at 746 (internal citations and quotations omitted).

The essential elements of robbery with a dangerous weapon are: "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use

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of a firearm or other dangerous weapon, (3) whereby the life of the person is endangered or threatened.” *State v. Mann*, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002) (citation and quotations omitted); *see also* N.C. Gen. Stat. § 14-87 (2005) (defining the crime of robbery with firearms or other dangerous weapons). “Robbery with a dangerous weapon requires that ‘the defendant’s use or threatened use of a dangerous weapon must precede or be concomitant with the taking, or be so joined with it in a continuous transaction by time and circumstances as to be inseparable.’” *State v. Bellamy*, 159 N.C. App. 143, 148-49, 582 S.E.2d 663, 667-68 (quoting *State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986)), *cert. denied*, 357 N.C. 579, 589 S.E.2d 130 (2003). However, “[t]he exact time relationship, in armed robbery cases, between the violence and the actual taking is unimportant as long as there is one continuing transaction.” *Id.* at 149, 582 S.E.2d at 668 (citation and quotations omitted); *see also State v. Green*, 321 N.C. 594, 605, 365 S.E.2d 587, 594 (1988) (“The commission of armed robbery . . . does not depend upon whether the threat or use of violence precedes or follows the taking of the victims’ property. Where there is a continuous transaction, the temporal order of the threat or use of a dangerous weapon and the takings is immaterial.”). Nevertheless, mere possession of a weapon is not sufficient to support an armed robbery conviction. *State v. Gibbons*, 303 N.C. 484, 489-91, 279 S.E.2d 574, 577-78 (1981).

In the instant case, Hernandez did not see defendant’s knife until defendant was taken into custody. However, Sergeant Weaver testified defendant, while holding a knife in his right hand and the recently stolen wallet in his left hand, threatened to harm Hernandez immediately after the short chase through the streets. Sergeant Weaver further testified that he first saw the knife in defendant’s hand right after defendant stood up after pushing Hernandez and taking his wallet. While defendant testified that he was holding a crack-pipe and not a knife in his hand, this contradiction is a matter for the jury to decide. Considering all evidence in the light most favorable to the State, the evidence was sufficient to send the charge of robbery with a dangerous weapon to the jury. *See Bellamy*, 159 N.C. App. at 147-49, 582 S.E.2d at 667-69 (holding evidence was sufficient to withstand motion to dismiss armed robbery charge when the defendant took two videos, fled the store pursued by an employee, and brandished a pocketknife and threatened the pursuing employee at the end of the chase). This assignment of error is overruled.

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II

[2] Defendant next argues the trial court erred in denying his request to instruct the jury that possession of a dangerous weapon is insufficient to satisfy the elements of robbery with a dangerous weapon. During the charge conference, defendant orally asked for an instruction that mere possession of a dangerous weapon does not satisfy the elements of armed robbery and submitted a written request asking the trial court to specifically instruct the jury that “[m]ere possession of a dangerous weapon does not satisfy the elements for this offense.” The trial court denied the request on the ground defendant’s request was covered by the pattern jury instruction.

It is well settled that “[i]f a ‘request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance.’” *State v. Chapman*, 359 N.C. 328, 379, 611 S.E.2d 794, 830 (2005) (quoting *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988)). “The crucial issue, [however], is whether the evidence supports defendant’s requested instruction[.]” *State v. Lane*, 115 N.C. App. 25, 31, 444 S.E.2d 233, 237, *disc. review denied*, 337 N.C. 804, 449 S.E.2d 753 (1994).

Here, the evidence does not support defendant’s contention that he merely possessed a knife while stealing Hernandez’s wallet. Defendant was seen holding a knife at the time he pushed Hernandez and took the wallet, and was further seen threatening Hernandez, saying “come and get it, I’ll f— you up[,]” while holding the wallet in one hand and a knife in the other. Here the trial court’s instruction, pursuant to the pattern jury instruction, stated that the jury must find that “the defendant obtained the property by endangering or threatening the life of that person with the dangerous weapon.” By its plain language, this instruction informed the jury, in substance, that mere possession of the weapon was not enough and defendant must have used the weapon to endanger or threaten the life of the victim. This assignment of error is overruled.

III

[3] Defendant also argues the trial court erred in allowing the State to question defendant about accusations for which defendant was not convicted and about the details of defendant’s prior convictions. Defendant contends the State exceeded the permissible scope of cross-examination and the questioning violated Rules 608(b) and 609(a) of the North Carolina Rules of Evidence.

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Rule 608(b) of the North Carolina Rules of Evidence provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness[.]

N.C. Gen. Stat. § 8C-1, Rule 608(b) (2005). Rule 609(a) further provides that “[f]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.” N.C. Gen. Stat. § 8C-1, Rule 609(a) (2005); *see also State v. Braxton*, 352 N.C. 158, 193, 531 S.E.2d 428, 448 (2000) (“Evidence of a witness’ prior convictions is admissible for the purpose of impeaching the witness’ credibility.”), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). The State, however, may not elicit “details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial.” *State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993). Nevertheless, “evidence which would otherwise be inadmissible may be permissible on cross-examination ‘to correct inaccuracies or misleading omissions in the defendant’s testimony or to dispel favorable inferences arising therefrom.’” *Braxton*, 352 N.C. at 193, 531 S.E.2d at 448 (quoting *Lynch*, 334 N.C. at 412, 432 S.E.2d at 354).

Here, defendant took the witness stand and testified in his own defense. On direct examination, defendant claimed that he did not “do violent crimes,” would not seriously hurt a person or put them in danger, and had never robbed anyone. On cross-examination, defendant was asked by the State if he had been convicted of misdemeanor “assault with a deadly weapon after the State reduced that from a felony assault to [misdemeanor assault with a] deadly weapon.” Defendant responded that “due to further investigation . . . the assault with deadly weapon . . . was dismissed.” Defendant was asked what kind of weapon was involved, and defendant responded “it supposedly had been a shotgun, but it was a BB gun.” Defendant was also asked if his 2003 plea to misdemeanor larceny had been reduced from common law robbery and he responded, “Yes[.]” Defendant was next

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asked if he had pleaded guilty in 1996 to misdemeanor possession of drug paraphernalia and he again responded, “Yes[.]” The State then asked if that charge had been reduced from felony possession with intent to sell or deliver cocaine, and defendant responded “Yes[.]” At this point, defendant’s counsel objected to the questions pertaining to the original charges. The trial court sustained the objection and allowed defendant’s subsequent motion to strike. Defendant did not request a limiting instruction and none was given to the jury. The State then inquired as to several other crimes for which defendant was convicted. No objections were made to any of the questions, and defendant admitted to each conviction.

Where defendant fails to object to the State’s cross-examination, he “has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997) (citing *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987)). Here, the State’s questioning was not in error, let alone plain error. During direct examination, defendant minimized the seriousness of his criminal involvement when he claimed that he was not a violent person and had never robbed anyone. This testimony opened the door to the State’s questioning as to defendant’s past criminal history. *See Braxton*, 352 N.C. at 193-94, 531 S.E.2d at 449 (“Considering defendant’s testimony on direct examination which tended to minimize the seriousness of his criminal involvement, we conclude the prosecutor did not exceed the scope of proper examination.”) When the questioning seemed to move beyond the purposes allowable under Rule 609(a), defendant’s objection was sustained without further ado. This assignment of error is overruled.

IV

[4] Defendant also contends the trial court erred in admitting at trial alleged non-corroborative hearsay evidence about what Hernandez said immediately following the robbery. Defendant did not object at trial to the admission of this evidence, therefore we review this contention only for plain error. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

The North Carolina Supreme Court has held that “[b]y definition, a prior statement is admitted only as corroboration of the substantive witness and is not itself to be received as substantive evidence.” *State v. Francis*, 343 N.C. 436, 446, 471 S.E.2d 348, 353 (1996) (quot-

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ing *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984)). Additionally, “prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness’ in-court testimony.” *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992) (citation omitted). “[A]n instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such an instruction.” *State v. Borkar*, 173 N.C. App. 162, 169, 617 S.E.2d 341, 345 (2005) (quoting *State v. Smith*, 315 N.C. 76, 82, 337 S.E.2d 833, 838 (1985)). A trial court has “wide latitude in deciding when a prior consistent statement can be admitted for corroborative, non[-]hearsay purposes.” *State v. Call*, 349 N.C. 382, 410, 508 S.E.2d 496, 513 (1998).

Early in the trial Hernandez testified that he did not “know if [defendant] pushed [him] or not[.]” On cross-examination, Hernandez testified he did not remember if defendant pushed him. After Hernandez finished his testimony, Officer K.C. Bell of the Winston-Salem Police Department testified that he responded to the scene of the arrest and acted as an interpreter to help interview Hernandez. Officer Bell testified that Hernandez told him “he was kneeled over and had his wallet on the ground in front of him and that someone had come up . . . , a black male, had pushed him over, [took] his wallet, and ran away[.]” Defendant argues Officer Bell’s testimony is hearsay evidence not admissible to corroborate Hernandez’s prior testimony as it actually contradicted Hernandez’s trial testimony.

Contrary to defendant’s argument, the testimony of Officer Bell does not contradict the testimony of Hernandez. At no point during his testimony did Hernandez state that defendant did not push him down, but rather only that he could not remember whether or not he was pushed down by defendant. Other than this one detail, the testimony of Officer Bell as to Hernandez’s statement taken shortly after the robbery is substantially similar to Hernandez’s in-court testimony. Furthermore, Sergeant Weaver testified that he saw defendant “push[] Mr. Hernandez onto the ground[.]” Thus, the admission of Officer Bell’s testimony concerning Hernandez’s prior statement was not error. This assignment of error is overruled.

[5] Defendant next argues the trial court erroneously admitted inadmissible hearsay evidence about the neighborhood. Again, defendant did not object at trial to the admission of this evidence, therefore we

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review this issue only for plain error. *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779. In North Carolina, the “general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay.” *State v. Weldon*, 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985) (citation omitted); *State v. Williams*, 164 N.C. App. 638, 639, 596 S.E.2d 313, 314 (2004). However, “if a statement is offered for any purpose other than that of proving the truth of the matter asserted, it is not objectionable as hearsay.” *State v. English*, 171 N.C. App. 277, 284, 614 S.E.2d 405, 410 (2005) (quoting *State v. White*, 298 N.C. 430, 437, 259 S.E.2d 281, 286 (1979)).

At trial, Sergeant Weaver testified that on 16 April 2005 he was conducting surveillance of the area where the robbery occurred because police “had numerous complaints of prostitution, street-level drugs, larcenies, shoplifting, robberies, assaults.” This testimony was elicited in response to the State’s question asking Sergeant Weaver why he was conducting surveillance in that area, on that day. As in *English*, this testimony was not admitted for the truth of the matter asserted, but rather to explain why Sergeant Weaver was in a position to observe the robbery. Therefore, the statement was not hearsay and was admissible. This assignment of error is overruled.

VI

[6] Defendant lastly argues the trial court erroneously coerced the verdict by instructing jurors they must reach a unanimous verdict. “Defendant did not object to this instruction at the time it was given and, therefore, must show that the trial court committed plain error.” *State v. Roache*, 358 N.C. 243, 309, 595 S.E.2d 381, 423 (2004). Defendant “must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.” *State v. Barden*, 356 N.C. 316, 383, 572 S.E.2d 108, 150 (2002) (quoting *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 723 (2001)), cert. denied, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003).

It is well settled that “a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the views of the majority is erroneous.” *State v. Whitman*, 179 N.C. App. 657, 670, 635 S.E.2d 906, 915 (2006) (quoting *State v. Holcomb*, 295 N.C. 608, 614, 247 S.E.2d 888, 892 (1978)). “In determining whether a trial court’s actions are coercive, an appellate court must look to the totality of the circumstances.” *State v. Dexter*, 151

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N.C. App. 430, 433, 566 S.E.2d 493, 496, *aff'd per curiam*, 356 N.C. 604, 572 S.E.2d 782 (2002).

In the instant case, at the conclusion of the jury charge, the trial court instructed the jurors as follows:

You may not return a verdict until all twelve jurors agree unanimously on what your verdict shall be. You may not return a verdict by majority vote. *You must all agree.*

When [you] have agreed upon your unanimous verdict, your foreperson should so indicate on the verdict form or should mark the appropriate place reflecting your verdict on the verdict form.

...

Okay. Ladies and gentleman, after retiring to the jury room, you should first select one of your members to serve as your foreperson. You may begin your deliberations only when the bailiff delivers the verdict form to you.

(Emphasis added.) During its deliberations, the jury had several questions for the trial court but did not inquire about the consequences of its failure to reach a unanimous verdict. The jury deliberated for less than two hours and never indicated it was divided. From the record before this Court, defendant has not shown that the trial court's instruction that they "must all agree" was an error absent which the jury probably would have returned a different verdict. See *State v. Applewhite*, 127 N.C. App. 677, 681, 493 S.E.2d 297, 299 (1997) (finding no plain error in the trial court's instruction that the jury "must . . . reach a unanimous verdict"). This assignment of error is overruled.

No error.

Judges MCGEE and STEELMAN concur.

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[181 N.C. App. 248 (2007)]

BELINDA SEAY, PLAINTIFF-APPELLANT v. NYCOLE SNYDER, DEFENDANT-APPELLEE

No. COA06-237

(Filed 2 January 2007)

1. Motor Vehicles— contributory negligence—sufficiency of evidence

The trial court did not err in an action arising out of an automobile accident in a curve of a rural road by submitting the issue of contributory negligence to the jury, because: (1) defendant's testimony that plaintiff was in the middle of the road tended to show that plaintiff did not exercise proper lookout and control of her vehicle; (2) statements made by defendant on the day of the accident tended to show that plaintiff did not exercise proper lookout or control of her vehicle; and (3) the trooper's testimony regarding the skid marks of both cars tended to show that both vehicles skidded approximately the same distance before impact and that neither plaintiff nor defendant exercised proper control of her vehicle.

2. Motor Vehicles— contributory negligence—instruction—general duty to drive on right hand side of road

The trial court did not err in an action arising out of an automobile accident by instructing the jury on the general duty to drive on the right hand side of the road as evidence of contributory negligence, because: (1) despite there being sufficient room for both vehicles to pass each other, defendant testified that both vehicles were driving in the middle of the road just before the accident; and (2) although plaintiff contends the instruction misled the jury since it did not take into account the narrowness of the pertinent road, the trial court also instructed the jury about the correspondingly increased duty of care based on increased dangers at a scene and that the width and nature of the roadway are taken into account in determining whether a vehicle was being operated at a speed greater than was reasonable and prudent.

3. Negligence— contributory negligence—motion for directed verdict—sufficiency of evidence

The trial court did not err in an action arising out of an automobile accident by denying plaintiff's motion for a directed verdict based on alleged insufficient evidence of plaintiff's contribu-

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tory negligence, because: (1) the same standard of review was applied in reviewing plaintiff's first assignment of error; and (2) there was sufficient evidence of plaintiff's contributory negligence to go to the jury.

4. Negligence— requested instruction—driving on narrow single lane road—duty to decrease speed or stop

The trial court did not err in an action arising out of an automobile accident by failing to give plaintiff's requested instruction to the jury that a motorist has a duty when driving on a narrow single lane road to slow down and if necessary stop in order to yield the right of way within a narrow lane of travel, because: (1) the requested instruction was not supported by the evidence because the road was wide enough to allow two vehicles to pass, and plaintiff even testified that there was room for two vehicles to pass each other safely at the point where the collision occurred; (2) the instructions given encompassed the substance of the requested instruction and thus did not mislead the jury; (3) the trial court's instruction to maintain control as a reasonably prudent person would under the circumstances addressed the need to stop or yield the right of way on a narrow road; and (4) the trial court's instructions on speed addressed the duty to slow down under certain circumstances, and the trial court specifically instructed the jury to consider the width and nature of the roadway when assessing whether the vehicles were traveling at a safe speed.

5. Evidence— accident report diagram—exclusion

The trial court did not err in an action arising out of an automobile accident by excluding a state highway patrol trooper's accident report diagram which showed defendant's vehicle was left of the centerline of the road at the point of impact, because: (1) the trooper did not witness the accident and reached her conclusion on the basis of her physical findings at the scene of the accident; and (2) the diagram depicting the point of impact was in essence a conclusion.

6. Parties— motion in limine—reference to attorney for plaintiff's underinsured motorist carrier—unnamed defendant

The trial court did not err in an action arising out of an automobile accident by denying plaintiff's motion in limine which sought to allow the attorney for plaintiff's underinsured

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motorist carrier to be referred to as representing the unnamed defendant, because: (1) plaintiff cited no authority for her position thus abandoning this assignment of error; (2) plaintiff does not claim any specific prejudice apart from alleging the trial court's error was inherently prejudicial; and (3) N.C.G.S. § 20-279.21(b)(4) provides that the underinsured motorist carrier shall have the right to appear in defense of the claim without being named as a party therein.

Appeal by Plaintiff from judgment and order entered 23 February 2005 by Judge James L. Baker, Jr. in Superior Court, Macon County. Heard in the Court of Appeals 21 September 2006.

Melrose, Seago & Lay, P.A., by Mark R. Melrose, for Plaintiff-Appellant.

Cogburn, Goosmann, Brazil & Rose, PA, by Patricia L. Arcuri and Jennifer N. Foster, for Defendant-Appellee.

Russell & King, P.A., by J. William Russell, for Unnamed Defendant-Appellee Alpha Property & Casualty Insurance Co.

MC GEE, Judge.

Belinda Seay (Plaintiff) appeals from judgment entered on jury verdicts finding that (1) Plaintiff was injured or damaged by the negligence of Nycole Snyder (Defendant), (2) Plaintiff contributed to her injury or damage by her own negligence, and (3) Defendant did not have the last clear chance to avoid Plaintiff's injury or damage. The trial court ordered that Plaintiff "shall have and recover nothing of . . . Defendant." We affirm.

Plaintiff testified at trial that she was a rural mail carrier and that on 19 December 2002, she was delivering mail on a narrow, gravel road. As Plaintiff approached a blind curve in the road, she looked ahead and saw a vehicle driving in the opposite direction. Plaintiff testified she drove through the worst part of the curve and stopped so the vehicle that was approaching her could pass. Plaintiff testified that she pulled her vehicle as far to the right side of the road as possible, leaving only six to eight inches between her vehicle's door and the bank of the road. Plaintiff testified that Defendant's vehicle

came around the curve and it was heading just straight at me, and it was going fast. But the main thing was [Defendant] wasn't looking, and I thought to myself, oh my God, and then she looked up.

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She did look up and then she swerved. So, you know, instead of hitting me head on, she caught my corner.

Defendant testified the accident occurred in a curve and that when she first saw Plaintiff, Plaintiff was in the middle of the road. Defendant testified she was also in the middle of the road, but that she slammed on her brakes and swerved to the right. Defendant testified that she measured the width of the vehicle she was driving at the time of the accident and it was approximately 6.4 feet wide.

Leah McCall (Trooper McCall) testified she was a trooper with the North Carolina State Highway Patrol on 19 December 2002, when she responded to the accident and conducted an investigation. Trooper McCall testified that Defendant made the following statement on the day of the accident: "I was coming down the road. By the time I saw the other car I slammed on my brakes and [Plaintiff] swerved over in my direction and we hit." Trooper McCall also testified that she measured the tire impressions on the road behind Plaintiff's and Defendant's vehicles and that the tire impressions were almost the same in length. Plaintiff's skid marks were 30.9 feet long and Defendant's skid marks were 31.3 feet long. Trooper McCall testified that the width of the road where the accident occurred was 14.4 feet and that Plaintiff's vehicle was approximately six feet wide. The remainder of the factual and procedural history of the case is set forth as necessary in the analysis portion of this opinion.

I.

[1] Plaintiff first argues the trial court erred by submitting the issue of contributory negligence to the jury. Plaintiff argues there was no evidence suggesting a lack of due care concerning her lookout and control and, as a result, there was no evidence of proximate cause. "Contributory negligence is 'negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains.' " *Bosley v. Alexander*, 114 N.C. App. 470, 472, 442 S.E.2d 82, 83 (1994) (quoting *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967)). To establish contributory negligence, a defendant must demonstrate: "(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury." *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004). "The issue of contributory negligence should be submitted to the jury if all the evidence and reasonable inferences drawn therefrom viewed in the light most favorable to the defendant tend to

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establish or suggest contributory negligence." *Bosley*, 114 N.C. App. at 472, 442 S.E.2d at 83. "If there is more than a scintilla of evidence, contributory negligence is for the jury." *Tatum v. Tatum*, 79 N.C. App. 605, 607, 339 S.E.2d 817, 818 (quoting *Pearson v. Luther*, 212 N.C. 412, 421, 193 S.E. 739, 745 (1937)), modified and aff'd per curiam, 318 N.C. 407, 348 S.E.2d 813 (1986).

In the present case, there was sufficient evidence of Plaintiff's contributory negligence to submit the issue to the jury. Defendant testified that the accident occurred in a curve and that when she first saw Plaintiff's vehicle, it was in the middle of the road. Defendant testified she was also in the middle of the road, but that she slammed on her brakes and swerved to the right. Defendant's testimony that Plaintiff was in the middle of the road tends to show that Plaintiff did not exercise proper lookout and control of her vehicle.

Trooper McCall testified that Defendant made the following statement on the day of the accident: "I was coming down the road. By the time I saw the other car I slammed on my brakes and [Plaintiff] swerved over in my direction and we hit." This testimony tends to show that Plaintiff did not exercise proper lookout or control of her vehicle. Trooper McCall also testified that she measured the tire impressions behind Plaintiff's and Defendant's vehicles and that the tire impressions were almost the same in length. Plaintiff's skid marks were 30.9 feet long and Defendant's skid marks were 31.3 feet long. This tends to show that both vehicles skidded approximately the same distance before impact and that neither Plaintiff nor Defendant exercised proper control of their vehicles. We conclude this evidence was sufficient for the trial court to submit the issue of Plaintiff's contributory negligence to the jury and we overrule this assignment of error.

II.

[2] Plaintiff next argues there was insufficient evidence to warrant the trial court's instruction on the general duty to drive on the right hand side of the road as evidence of contributory negligence, and that this instruction misled the jury. Our Court reviews jury charges contextually and in their entirety. *Hughes v. Webster*, 175 N.C. App. 726, 730, 625 S.E.2d 177, 180, disc. review denied, 360 N.C. 533, 633 S.E.2d 816 (2006). "The charge will be held to be sufficient if 'it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed[.]'" *Id.* at 730, 625 S.E.2d at 180-81 (quoting *Jones v. Development Co.*, 16

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N.C. App. 80, 86-87, 191 S.E.2d 435, 440, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972)).

In the present case, the trial court instructed the jury as follows: "With respect to . . . [D]efendant's third contention, the motor vehicle law provides that a motorist shall drive on the right half of the street or highway. A violation of this law is negligence within itself."

There was sufficient evidence presented at trial to support this instruction. Trooper McCall testified that the width of the road where the accident occurred was 14.4 feet. Trooper McCall also testified that the vehicle driven by Plaintiff was approximately six feet wide. Defendant testified she measured the width of the vehicle she was driving at the time of the accident and it was approximately 6.4 feet wide. Therefore, it was possible for the two vehicles to pass each other on the roadway. Plaintiff also testified that there was room for two vehicles to pass each other safely at the point where the collision occurred. Despite there being sufficient room for both vehicles to pass each other, Defendant testified that both vehicles were driving in the middle of the road just before the accident. Therefore, the trial court did not err by instructing the jury on the general duty to drive on the right hand side of the road.

Plaintiff also argues the jury instruction misled the jury because it did not take into account the narrowness of the road in question. However, in addition to the challenged instruction, the trial court also instructed the jury as follows: "When the conditions existing at the scene increase the danger in comparison to normal conditions, the care required of the operator is correspond[ingly] increased." With respect to speed, the trial court also instructed that "[i]n determining whether a vehicle was being operated at a speed greater than was reasonable and prudent you should consider . . . the width and the nature of the roadway[.]" We find no error in the jury instruction as a whole and overrule this assignment of error.

III.

[3] Plaintiff argues the trial court erred by denying her motion for directed verdict because there was insufficient evidence of Plaintiff's contributory negligence. "The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991). Because this is the same standard of review as we applied in

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reviewing Plaintiff's first assignment of error, and because there was sufficient evidence of Plaintiff's contributory negligence to go to the jury, we overrule this assignment of error.

IV.

[4] Plaintiff next argues the trial court erred by failing to instruct the jury that a motorist has a duty, "when driving on a narrow, single lane road, to slow down and if necessary stop in order to yield the right of way within a narrow lane of travel." To prevail on the issue of whether a requested instruction should have been submitted to the jury, the party requesting the instruction must demonstrate that "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Liborio v. King*, 150 N.C. App. 531, 534, 564 S.E.2d 272, 274, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002).

In the present case, the requested instruction was not supported by the evidence. Plaintiff requested this instruction on the basis of *Brown v. Products Co., Inc.*, 222 N.C. 626, 24 S.E.2d 334 (1943), where the plaintiff's vehicle collided with a vehicle owned by the corporate defendant (the defendant) and driven by the defendant Hampton (Hampton). *Id.* at 627, 24 S.E.2d at 335. The plaintiff took a voluntary nonsuit with respect to Hampton and, on the defendant's motion, the trial court entered judgment of nonsuit as to the defendant. *Id.*

In *Brown*, there had been a heavy snow prior to the accident and the snow had not been completely removed from the road at and near the point of collision. *Id.* at 627, 24 S.E.2d at 335.

About 150 feet north of the point of collision the snowbank began to gradually encroach upon the hard surface on the west side until a lane only about 10 feet wide on [the] plaintiff's left side of the road remained for use. This lane continued about 50 or 75 feet and then opened up "all at once to two lanes." [The] [p]laintiff entered the restricted area as he rounded a curve and was in the narrow 10-foot passageway when Hampton approached. At that point the snowbank on the west half of the road was 2 or 3 feet high and was observable by motorists approaching from the south. While [the] plaintiff was in this narrow lane he observed Hampton about 400 feet away approaching from the south travel-

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ing about 45 miles per hour. Hampton did not slow down, but entered the narrow lane before [the] plaintiff could get out to a point where he could safely turn to his right. [The] [p]laintiff attempted to cut to the right on the snow bank, but was unable to do so, and the cars collided. [The] [p]laintiff was traveling 20 to 25 miles per hour. He had chains on his wheels.

Id. at 627-28, 24 S.E.2d at 335.

Our Supreme Court recognized that at the point of collision, the highway had been narrowed to a “one-way or one-lane road-not a two-lane highway[,]” and that the plaintiff had entered this “one-way lane” before Hampton entered. *Id.* at 629, 24 S.E.2d at 336. The Court held:

If Hampton did see and observe this condition which created a special hazard and made it impossible for two cars to pass in safety, or if by keeping a proper lookout he could have seen, it was his duty to slow down and if necessary to stop in order to yield the right of way within the narrow lane to [the] plaintiff.

Id. Accordingly, the Court reversed judgment of nonsuit for the defendant. *Id.* at 630, 24 S.E.2d at 336.

In the present case, unlike in *Brown*, the road on which the accident occurred was not a one-way or one-lane road. The road was wide enough to allow two vehicles to pass. Plaintiff even testified that there was room for two vehicles to pass each other safely at the point where the collision occurred. Therefore, the evidence did not support the requested instruction.

Moreover, the instructions given encompassed the substance of the requested instruction, and therefore, the instructions did not mislead the jury. With respect to control, the trial court instructed:

[T]he operator of a motor vehicle on a highway has a duty to keep the vehicle under proper control. This means that the operator is at all times under a duty to operate a vehicle at a speed and in a manner which allows him or her to maintain that degree of control over the vehicle which a reasonably careful prudent person would have maintained under the same or similar circumstances. When the conditions existing at the scene increase the danger in comparison to normal conditions, the care required of the operator is correspond[ingly] increased.

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The trial court also instructed the jury that “the motor vehicle law provides that it is unlawful to operate a motor vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions then existing.” The trial court further instructed:

In determining whether a vehicle was being operated at a speed greater than was reasonable and prudent you should consider all of the evidence about the physical features of the scene; the hour of day or night; the weather conditions; the extent of other traffic; the width and nature of the roadway, and any other circumstances shown to exist.

The trial court also instructed the jury on the duty to decrease speed to avoid a collision as follows:

[T]he motor vehicle law provides that the fact that a person is driving her vehicle at a speed lower than a posted speed limit does not relieve her of a duty to decrease her speed as might be necessary to avoid colliding with any vehicle on a street or highway and to avoid injury to any person or property. Thus, even though the speed of . . . [D]efendant’s vehicle was lower than the posted speed limit set by law, if she failed to decrease speed when under the existing circumstances a reasonably careful[] and prudent person would have decreased the speed to avoid colliding with any vehicle on a street or highway and to avoid any injury with any person or damage to any property, then such failure would be negligence.

The trial court’s instruction to maintain control as a reasonably prudent person would under the circumstances addressed the need to stop or yield the right of way on a narrow road. The control instruction also stated that the level of care increased “[w]hen the conditions existing at the scene increase the danger in comparison to normal conditions[.]” The trial court’s instructions on speed addressed the duty to slow down under certain circumstances and the trial court specifically instructed the jury to consider the width and nature of the roadway when assessing whether the vehicles were traveling at a safe speed. Therefore, the instructions given encompassed the requested instruction and did not mislead the jury. Accordingly, because the requested instruction was not supported by the evidence and because the instructions given encompassed the substance of the requested instruction, we overrule this assignment of error.

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V.

[5] Plaintiff next argues the trial court erred by excluding Trooper McCall's accident report diagram, which showed that Defendant's vehicle was left of the centerline of the road at the point of impact. We disagree.

Defendant argues that we should dismiss this assignment of error because the excluded accident report diagram was not included in the record on appeal. However, the transcript reveals that the diagram, which was prepared by Trooper McCall from the evidence she gathered at the scene, attempted to show the placement of the vehicles at the time of the accident. Specifically, the diagram attempted to show that Defendant's vehicle was over the centerline of the road at the point of impact. Therefore, because the substance of the diagram is in the transcript, we address this issue.

Plaintiff argues that the diagram merely portrayed Trooper McCall's physical findings, the results of which "deem[ed] . . . Defendant to [have been] left of center at the point of impact[.]". However, our Court has held that testimony concerning point of impact is impermissible lay opinion testimony. In *State v. Wells*, 52 N.C. App. 311, 278 S.E.2d 527 (1981), an officer testified that he arrived on the scene of an accident and discovered two vehicles, a Ford and a Chevrolet, in the eastbound lane of a two-lane road. *Id.* at 311-12, 278 S.E.2d at 528. The Ford was facing south and the Chevrolet was facing west; both vehicles were heavily damaged on the left front side. *Id.* at 312, 278 S.E.2d at 528. The officer found the defendant, who was unconscious, in the Ford, and found the decedent in the Chevrolet. *Id.* The officer found glass, dirt and pieces of chrome in the center of the eastbound lane and found a fender in the westbound lane. *Id.* The officer also observed fresh gouge marks near the debris in the center of the eastbound lane and observed asphalt under the front of the Ford. *Id.* The officer then concluded, based on the location of the gouge marks and the debris, that the impact had occurred in the center of the eastbound lane. *Id.* The defendant was convicted of, *inter alia*, involuntary manslaughter. *Id.* at 313, 278 S.E.2d at 529.

Our Court recognized that "while it is competent for an investigating officer to testify as to the condition and position of the vehicles and other physical facts observed by him at the scene of an accident, his testimony as to his conclusions from those facts is incompetent." *Id.* at 314, 278 S.E.2d at 529. Our Court held that "[b]y

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testifying that his investigation revealed the point of impact between the two cars to be in [the] decedent's lane of travel, [the officer] stated an opinion or conclusion which invaded the province of the jury." *Id.* Therefore, our Court held that the defendant was entitled to a new trial on the manslaughter charge as a result of the trial court's erroneous admission of the officer's incompetent opinion testimony. *Id.* at 316, 278 S.E.2d at 530.

In the present case, Trooper McCall's diagram indicated that the point of impact occurred in Plaintiff's lane of travel. However, Trooper McCall did not witness the accident and reached this conclusion on the basis of her physical findings at the scene of the accident. Because the diagram depicting the point of impact was in essence a conclusion, the trial court did not err by excluding the diagram from evidence. We overrule this assignment of error.

VI.

[6] Plaintiff argues the trial court erred by denying her motion *in limine*, which sought to allow the attorney for Plaintiff's underinsured motorist carrier, J. William Russell (Mr. Russell), to be referred to as representing the "unnamed defendant." The trial court introduced Mr. Russell as follows: "Also at the defense table with Ms. Arcuri on behalf of . . . [D]efendant is attorney William Russell." Plaintiff argues it was "inherently prejudicial that the jury was led to believe that Mr. Russell was present at trial in a representative capacity for . . . Defendant, as he simply was not."

However, Plaintiff cites no authority for her position, and has therefore abandoned this assignment of error. See N.C.R. App. P. 28(b)(6). Moreover, Plaintiff does not claim any specific prejudice, apart from alleging the trial court's error was "inherently prejudicial." We further note that N.C. Gen. Stat. § 20-279.21(b)(4) (2005) provides that "[u]pon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party." We overrule this assignment of error.

Affirmed.

Judges WYNN and McCULLOUGH concur.

CASH v. LINCARE HOLDINGS

[181 N.C. App. 259 (2007)]

ROBBIE A. CASH, EMPLOYEE, PLAINTIFF-APPELLEE v. LINCARE HOLDINGS, EMPLOYER,
TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS

No. COA06-77

(Filed 2 January 2007)

1. Workers' Compensation— possibility of future medical treatment—appeal not interlocutory

An appeal from a workers' compensation case involving payment for medical treatment was not interlocutory even though defendant argued that other hearings on the same issue were possible in the future. The Commission's order resolved all issues surrounding the disputed treatment and did not contemplate further hearings. The fact that the order did not determine wage compensation did not render the appeal interlocutory; the determination of medical compensation is separate from the determination of disability compensation.

2. Workers' Compensation— emergency treatment—compensable—binding findings supporting conclusions

Industrial Commission findings in a workers' compensation case were deemed binding where the assignments of error were not supported by arguments in the brief. The findings supported conclusions that the medical treatment received by plaintiff was reasonably necessary for an emergency, and that defendants must pay for treatment given at specific times. N.C.G.S. § 97-25.

Appeal by Defendants from opinion and award entered 8 September 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 September 2006.

Michael E. Mauney; and Rigsbee & Cotter, P.A., by William J. Cotter, for Plaintiff-Appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Sharon E. Dent, for Defendants-Appellants.

McGEE, Judge.

Defendants appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) filed 8 September 2005, affirming a Deputy Commissioner's decision awarding Plaintiff medical treatment pursuant to N.C. Gen. Stat. § 97-25. Plaintiff also filed a motion to dismiss this appeal as interlocutory.

CASH v. LINCARE HOLDINGS

[181 N.C. App. 259 (2007)]

I. Facts

Robbie A. Cash (Plaintiff) was injured in a motor vehicle collision on 8 October 2001, while Plaintiff was employed as a respiratory therapist for Defendant Lincare Holdings, Inc. (Lincare). Plaintiff was taken to the emergency room at Duke University Medical Center and was admitted for three days. The emergency room report stated that Plaintiff "complained of pain to the belly and to the neck and back." Plaintiff also had difficulty urinating. Lincare admitted compensability by filing a Form 60 on 11 February 2002 and began paying Plaintiff's medical expenses and weekly wage compensation.

After the 8 October 2001 accident, Plaintiff sought follow-up care with Dr. Robert Wilson (Dr. Wilson) and Dr. Thomas Dimmig (Dr. Dimmig), with Triangle Orthopaedics, for his spine and neck injuries, and with Dr. Robert Andrews (Dr. Andrews) for his urination dysfunction. After medication failed to correct Plaintiff's urination problem, Dr. Andrews opined that Plaintiff's "voiding problems [were] secondary to his primary spine injury and treatment of the primary spine injury should not be delayed." Plaintiff returned for a follow-up appointment on 20 March 2002 and Dr. Andrews reiterated that "ultimate improvement will require identification and treatment of his underlying spinal pathology." After Plaintiff's initial appointment with Dr. Dimmig, Lincare arranged for Plaintiff to be treated by Dr. Scott Sanitate (Dr. Sanitate) of the Carolina Back Institute.

Plaintiff saw Dr. Sanitate on 13 December 2001 and reported numbness in his upper and lower extremities, incontinence, difficulty swallowing, and cervical and lumbar pain. Plaintiff reported he felt most of his discomfort on his left side. Plaintiff saw Dr. Sanitate again on 17 January 2002. Despite Plaintiff's reluctance, Dr. Sanitate released Plaintiff to return to work, with no lifting greater than twenty-five pounds. Plaintiff moved for a Change of Treating Physician to return to the care of Triangle Orthopaedics, which was granted by the Industrial Commission.

Dr. Dimmig assumed Plaintiff's care once again, and performed lumbar decompression and fusion surgery on Plaintiff's back on 26 March 2002. As a result of the surgery, Plaintiff reported improvement in his back pain and in his ability to urinate, though he continued to complain of significant pain in his neck, left shoulder, and in his left knee.

After the 8 October 2001 accident, Plaintiff also developed difficulty swallowing liquids. The physician treating Plaintiff for this

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problem referred Plaintiff to a neurologist, and Plaintiff began seeing Dr. Jeffrey Siegel (Dr. Siegel). Plaintiff reported daily headaches, muscle spasms, and continued swallowing problems. Plaintiff continued seeing both Dr. Dimmig and Dr. Siegel.

Dr. Dimmig performed an additional surgery on Plaintiff's neck on 16 July 2002. After the surgery, Plaintiff developed numbness around his neck, hands, and right leg, and weakness in his left arm. He continued to experience difficulty swallowing. Plaintiff returned for a follow-up visit with Dr. Dimmig and complained of increased right leg pain. Dr. Dimmig ordered an MRI. Plaintiff's MRI was "satisfactory" and on 20 December 2002, Dr. Dimmig concluded that "other interventional treatment [was not] necessary." On 17 January 2003, Dr. Dimmig stated that Plaintiff "[was] reaching maximum medical improvement" and Dr. Dimmig would consider discharging Plaintiff with permanent restrictions when Plaintiff returned for his next follow-up in approximately one month. After ordering a functional capacity evaluation, Dr. Dimmig concluded that Plaintiff required sedentary-type work and was unable to work a four-hour or eight-hour day. At Plaintiff's 11 April 2003 visit, Dr. Dimmig found Plaintiff to be at maximum medical improvement, concluded that Plaintiff could work a four-hour to eight-hour work day in a sedentary-type job, and discharged Plaintiff.

Plaintiff continued seeing Dr. Siegel for neurological care, and in a follow-up note dated 6 March 2003, Dr. Siegel indicated that Plaintiff was upset at being "abruptly released" from care by Dr. Dimmig. Dr. Siegel suggested that Plaintiff seek additional orthopedic care with another orthopedic surgeon. Dr. Siegel noted on 11 April 2003 that Plaintiff would be at maximum medical improvement neurologically "very shortly" but that Plaintiff "was not yet there." After reviewing the results of Plaintiff's functional capacity evaluation, Dr. Siegel felt that Plaintiff was totally disabled and unable to work even four hours at a time. Dr. Siegel noted on 9 May 2003 that Plaintiff thought he needed a second opinion for ongoing left knee and left arm pain since he had been discharged from Dr. Dimmig's care, and Dr. Siegel agreed. Dr. Siegel concluded that Plaintiff was at maximum medical improvement with the exception of Plaintiff's orthopedic problems.

Plaintiff filed a motion to compel Lincare's insurance carrier, Travelers Insurance Company (Travelers), to authorize the medical treatment recommended by Dr. Siegel on 2 June 2003. Plaintiff saw Dr. Siegel again on 23 June 2003 and 25 July 2003, and complained of being "jerked . . . around" by Travelers. Dr. Siegel recommended,

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inter alia, psychological or psychiatric care for Plaintiff for increased depression and anxiety, follow-up orthopedic care, and follow-up neurological care, which Travelers refused to authorize. By letter, Travelers instructed Dr. Siegel to restrict his care to treatment of Plaintiff's swallowing dysfunction and headaches, and not to treat any psychiatric conditions or back problems.

While Plaintiff was waiting for the Commission to rule on his motion to compel, Plaintiff's five-year old son was involved in a bicycle accident. Plaintiff felt that as a result of his ongoing injuries, he was unable to assist his son and decided to "take [his] health into his own hands." Plaintiff sought treatment from Dr. Paul Suh (Dr. Suh), an orthopedic surgeon at the North Carolina Spine Center, on 15 July 2003. Dr. Suh referred Plaintiff to Dr. Andrew Jones (Dr. Jones) for Plaintiff's shoulder and knee problems. Dr. Suh treated Plaintiff for continued low back pain and started Plaintiff on physical therapy.

In an administrative order dated 21 July 2003, the Commission granted Plaintiff's motion to compel, and ordered Travelers to authorize and pay for Plaintiff's treatment as recommended by Dr. Siegel. Neither Lincare nor Travelers appealed this order. Under Dr. Suh's care, Plaintiff underwent a lumbar myelogram and CT scan on 12 September 2003, which revealed mild degenerative disc disease. Dr. Suh also stated that Plaintiff might benefit from removal of a "pedicle screw" to alleviate thigh pain. Dr. Jones gave Plaintiff a corticosteroid injection in his left shoulder and recommended knee surgery be performed by Dr. Clifford Wheeless (Dr. Wheeless). Dr. Wheeless operated on Plaintiff's left knee on 1 October 2003, and found several knee injuries, including a meniscus tear.

Plaintiff filed a motion to compel payment for the treatment provided by Drs. Jones, Suh, and Wheeless on 4 September 2003. In an administrative order dated 22 September 2003, the Commission denied Plaintiff's motion, but "noted that [D]efendants shall continue compliance with the medical order entered July 21, 2003." Dr. Siegel wrote prescriptions for Plaintiff to receive treatment by Drs. Jones, Suh, and Wheeless on 24 September 2003.

Travelers ultimately approved Plaintiff to obtain a psychological evaluation as recommended by Dr. Siegel, and Plaintiff saw Dr. Robert Arne Newman (Dr. Newman). Dr. Newman stated that Plaintiff suffered from conversion disorder, which leaves affected individuals "vulnerable to developing physical symptoms in response to stress" and "an unrealistic interpretation of physical signs or symptoms[.]"

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Plaintiff filed a motion to reconsider, which the Commission denied. Plaintiff appealed the administrative decision and a hearing on the appeal was held on 9 February 2004. In an opinion and award dated 30 November 2004, the Deputy Commissioner concluded that the treatment rendered by Drs. Jones, Suh, and Wheeless from 15 July 2003 to 24 September 2003 was emergency treatment reasonably necessary to give relief and effect a cure pursuant to N.C. Gen. Stat. § 97-25. The Deputy Commissioner also concluded that the treatment provided subsequent to 24 September 2003 was reasonably necessary to effect a cure or give relief for injuries proximately caused by the 8 October 2001 accident. Therefore, Defendants were ordered to pay for the referenced treatment. Defendants appealed to the Commission, which affirmed the opinion and award with minor modifications. The Commission also authorized Drs. Jones, Suh, and Wheeless as Plaintiff's treating physicians. Defendants appeal.

II. Plaintiff's Motion to Dismiss as Interlocutory

[1] N.C. Gen. Stat. § 97-86 (2005) governs an appeal from an opinion and award of the Commission, and provides that any party to the dispute may "appeal from the decision of [the] Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." "Parties have a right to appeal any final judgment of a superior court. Thus, an appeal of right arises only from a final order or decision of the Industrial Commission." *Ratchford v. C.C. Mangum, Inc.*, 150 N.C. App. 197, 199, 564 S.E.2d 245, 247 (2002) (citation omitted). Therefore, "[a] decision of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case. A decision that on its face contemplates further proceedings or . . . does not fully dispose of the pending stage of the litigation is interlocutory." *Perry v. N.C. Dep't of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006) (internal citations and quotation marks omitted). Even where a decision is interlocutory, however, immediate review of the issue is proper where the interlocutory decision affects a substantial right. *Id.* To qualify, the right affected must be substantial, and "the deprivation of that substantial right must potentially work injury if not corrected before appeal from a final judgment." *Id.*

In his motion to dismiss, Plaintiff argues that the appeal in the present case is interlocutory because "other hearings or appeals for the same or similar medical payment issues are possible in the future[.]" Thus, hearing the appeal will lead to the "yo-yo procedure"

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which “works to defeat the very purpose of the Workers’ Compensation Act.” *Hardin v. Venture Construction Co.*, 107 N.C. App. 758, 761, 421 S.E.2d 601, 602-03 (1992). We disagree.

The opinion and award which is the subject of this appeal was filed following a full evidentiary hearing before a Deputy Commissioner, and was subsequently reviewed by the Commission. The award does not contemplate further proceedings, nor does it remand the matter to the Deputy Commissioner. Rather, the order resolves all issues surrounding the disputed medical treatment.

N.C. Gen. Stat. § 97-25 (2005) mandates that “[m]edical compensation shall be provided by the employer.” The Workers’ Compensation Act defines this term to include “medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment . . . as may reasonably be required to effect a cure or give relief[.]” N.C. Gen. Stat. § 97-2(19) (2005). Our Supreme Court has noted that

the legislature always has provided for, and continues to provide for, two distinct components of an award under the Workers’ Compensation Act: (1) payment for the cost of medical care, now denominated “medical compensation,” which consists of payment of the employee’s medical expenses incurred as a result of a job-related injury; and (2) general “compensation” for financial loss other than medical expenses, which includes payment to compensate for an employee’s lost earning capacity and payment of funeral expenses.

Hyler v. GTE Products Co., 333 N.C. 258, 267, 425 S.E.2d 698, 704 (1993). Thus, the Commission’s determination that an employer must pay an injured employee medical compensation pursuant to N.C.G.S. § 97-25 is a separate determination from whether an employer owes compensation as a result of an employee’s disability. Neither determination is a necessary prerequisite for the other. Therefore, the fact that the order Defendants appealed contains no determination of any wage compensation owed to Plaintiff does not render this appeal interlocutory.

We find further support for this conclusion in prior cases arising from disputes over payment of medical expenses under N.C.G.S. § 97-25. We are mindful that the language of N.C.G.S. § 97-25 has been amended since these cases were decided, but note that the amendments do not affect whether an appeal from an opinion and

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award under this section is interlocutory. In *Bass v. Mecklenburg County*, 258 N.C. 226, 235, 128 S.E.2d 570, 576 (1962), our Supreme Court stated

[i]t is our opinion, and we so hold, that when the Commission approves claimant's such bills, defendant shall then have a right on appeal to challenge the action of the Commission in respect to the bills approved by it, in whole or in part, if it deems it advisable to do so.

Further, in *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 121-22, 415 S.E.2d 583, 588 (1992), this Court said

we note that in the case of a controversy arising between plaintiff and defendant relative to the continuance of medical treatment, the Industrial Commission is vested with the authority to order such further treatments as may in its discretion be necessary, N.C.G.S. § 97-25 (1991), and if the Commission approves a medical bill that in defendant's opinion is not compensable, then defendant at that time shall have a right and opportunity on appeal to challenge the Commission's decision.

Thus, we deny Plaintiff's motion to dismiss this appeal as interlocutory and review the merits of Defendants' appeal.

III. Defendants' Substantive Appeal

[2] Our review in a workers' compensation case is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). Where the Commission's findings are supported by competent evidence, those findings are conclusive even if there is evidence to support a contrary finding. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). We first note that although Defendants assign error to several of the Commission's findings of fact, Defendants do not support these assignments of error with arguments in their brief. We deem these assignments of error abandoned. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."). As a result, the Commission's findings of fact are binding on this Court. *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 701, 632 S.E.2d 525, 528

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(2006). Our review is limited to whether the Commission's findings of fact justify the following conclusions of law:

1. The treatment received by [P]laintiff at North Carolina Spine Center prior to the Industrial Commission order of July 21, 2003, was reasonably necessary under the circumstances and constitutes an emergency as defined by N.C. Gen. Stat. § 97-25.
2. The Industrial Commission Order of July 21, 2003, provided that [D]efendants shall authorize and pay for [P]laintiff's treatment as recommended by Dr. Siegel. On September 24, 2003, Dr. Siegel recommended treatment for [P]laintiff with Dr. Jones, Dr. Suh, and Dr. Wheeless. On or after September 24, 2003, [D]efendants had not provided any other orthopedic treatment or options to Plaintiff. Pursuant to Industrial Commission order July 21, 2003, treatment subsequent to September 24, 2003 provided by Dr. Jones, Dr. Suh, and Dr. Wheeless, as recommended by Dr. Siegel, should be paid for by [D]efendants.
3. The treatment provided to [P]laintiff, at North Carolina Spine Center from Dr. Jones and Dr. Suh, and the treatment provided by Dr. Wheeless for [P]laintiff's left knee was necessary to effect a cure and give relief. N.C. Gen. Stat. § 97-25.

We find the Commission's conclusions of law to be supported by its findings of fact, and therefore affirm the Commission's opinion and award.

Defendants challenge the Commission's conclusion that "the treatment received by Plaintiff at the North Carolina Spine Center prior to the Industrial Commission order of July 21, 2003, was reasonably necessary under the circumstances and constituted an emergency as defined by N.C. Gen. Stat. § 97-25."

Pursuant to N.C. Gen. Stat. § 97-25 (2005),

If in an emergency on account of the employer's failure to provide the medical or other care as herein specified a physician other than provided by the employers is called to treat the injured employee the reasonable cost of such service shall be paid by the employer, if so ordered by the Industrial Commission.

Our courts have concluded an employee is justified "in seeking another physician in an emergency where the employer's failure to provide medical services amounts merely to an inability to provide

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those services." *Schofield v. Tea Co.*, 299 N.C. 582, 588, 264 S.E.2d 56, 61 (1980) (emphasis omitted). Further, "an injured employee has the right to procure, even in the absence of an emergency, a physician of his own choosing, subject to the approval of the Commission." *Id.* at 591, 264 S.E.2d at 64.

At the time that Plaintiff sought treatment at the North Carolina Spine Center, he had been discharged from Dr. Dimmig's care. Yet, Dr. Siegel recommended additional orthopedic evaluation, and Plaintiff still reported pain. When Defendants refused the care recommended by Dr. Siegel, Plaintiff moved the Commission for an order compelling Defendants to provide further care. Thus, Plaintiff sought authorization from the Commission prior to obtaining care on his own. Plaintiff did not seek care on his own until 15 July 2003, more than three months after being discharged by Dr. Dimmig, and after receiving no further orthopedic treatment, despite continued pain. Further, the Commission's findings as to the nature of the emergency were sufficient. The duration of the emergency is clear (the treatment provided by Drs. Jones, Suh, and Wheeless from 15 July 2003 to 24 September 2003) and the Commission concluded the care was "reasonably necessary under the circumstances." See *Schofield*, 299 N.C. at 594, 264 S.E.2d at 64.

Defendants next challenge the Commission's conclusion that Defendants must pay for the medical treatment provided by Drs. Jones, Suh, and Wheeless subsequent to 24 September 2003 pursuant to the 21 July 2003 order. The Commission's 21 July 2003 order mandated that Defendants authorize and pay for the treatment recommended by Dr. Siegel. Dr. Siegel referred Plaintiff to Drs. Jones, Suh, and Wheeless on 24 September 2003. Pursuant to the 21 July 2003 order, Defendants were responsible for this treatment.

Finally, Defendants argue that the Commission erred when it concluded that the treatment provided by Drs. Jones, Suh, and Wheeless was necessary to effect a cure and give relief. Defendants argue this additional treatment provided by Drs. Jones, Suh, and Wheeless was not related to the compensable injury, and therefore Defendants were not responsible for this treatment. We disagree.

Medical treatment awarded pursuant to N.C. Gen. Stat. § 97-25 must be "directly related to the original compensable injury." *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286, *disc. review denied*, 343 N.C. 513, 472 S.E.2d 18 (1996). "If additional medical treatment is required, there arises a rebuttable presumption

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that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury.” *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999). Defendants argue that the testimony of Dr. Dimmig that Plaintiff had reached maximum medical orthopedic improvement, and Dr. Newman’s diagnosis of conversion disorder show the treatment was not related to the compensable injury. Plaintiff points us to the opinion of Dr. Siegel, who traced Plaintiff’s orthopedic problems to the 8 October 2001 accident. Defendants ask us to resolve a credibility issue, which is not our role. *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965) (“The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.”).

Affirmed.

Judges WYNN and McCULLOUGH concur.

RENTENBACH CONSTRUCTORS, INC., PLAINTIFF v. CM PARTNERSHIP AND
LEXINGTON STATE BANK, DEFENDANTS

No. COA06-242

(Filed 2 January 2007)

Uniform Commercial Code— security interest—accounts receivable

The trial court did not err by granting summary judgment in favor of defendant bank based on its determination that the bank had a priority lien position with respect to monies owed by plaintiff to Forsyth Drywall, because: (1) defendant bank perfected its security interest in the accounts receivable several years prior to defendant CM, and thus had a superior security interest; (2) although CM executed a security agreement with Forsyth Drywall prior to the date of the bank’s 26 June 2002 loan to Forsyth Drywall, the bank nonetheless has priority since it was the first to file a financing statement; and (3) in the absence of a security agreement showing an assignment of the bank’s security interest in the accounts receivable, there was no evidence that such an

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assignment took place and the record strongly suggested that the parties intended only to exchange their respective priority positions with respect to the accounts receivable.

Appeal by defendant-appellant from judgment entered 26 September 2005 by Judge Lindsay R. Davis, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 24 August 2006.

Clark Bloss & Wall, PLLC, by John F. Bloss, for defendant-appellant.

Brinkley Walser, PLLC, by G. Thompson Miller, for defendant-appellee.

Carruthers & Roth, by Kenneth R. Keller.

LEVINSON, Judge.

Defendant-appellant, CM Partnership (“CM”), appeals from summary judgment entered in favor of defendant-appellee Lexington State Bank (“LSB”). We affirm.

Forsyth Drywall and Fireproofing, L.L.C. (“Forsyth Drywall”) is a North Carolina corporation; defendants are secured creditors of Forsyth Drywall. The relevant facts are summarized as follows: In 1999 LSB loaned money to Forsyth Drywall, secured by Forsyth Drywall’s inventory, accounts, equipment, and other collateral. LSB filed a UCC financing statement on 12 February 1999. In 2001 United Capital Funding Corp. (“UC”) was interested in factoring some of Forsyth Drywall’s accounts receivable. When UC’s investigation revealed that Forsyth Drywall’s accounts receivable were part of the collateral for LSB’s loan to Forsyth Drywall and thus were subject to a prior lien, UC requested a “first lien position” before it would factor Forsyth Drywall’s accounts. On 24 September 2001 LSB filed an amendment to its financing statement, purporting to make a partial assignment to UC of its “security interest” in certain of Forsyth Drywall’s accounts receivable. Thereafter, UC advanced Forsyth Drywall money in exchange for certain of Forsyth Drywall’s accounts receivable.

On 20 June 2002 Forsyth Drywall entered into a separate factoring agreement with CM, in which CM agreed to buy Forsyth Drywall’s accounts receivable, including the account at issue herein. CM advanced money to Forsyth Drywall, which then repaid the money it had borrowed from UC. Forsyth Drywall and CM executed a security agreement setting out the terms of their factoring agree-

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ment. However, CM did not file a UCC financing statement until January 2003.

On 26 June 2002 LSB executed a second loan to Forsyth Drywall, consolidating its debt to LSB. This loan was also secured by Forsyth Drywall's assets, inventory, accounts receivable, and other collateral, including the account at issue in the present case. LSB perfected its security interest in this collateral by reliance on its 1999 financing statement. In February 2003 UC executed a "reassignment" of the first lien position to LSB.

Forsyth Drywall later defaulted on its obligations to both LSB and CM, and filed a Chapter 7 bankruptcy petition in March 2003. Thereafter, defendants each claimed a first priority, perfected security interest in approximately \$72,500 that plaintiff Rentenbach Constructors, Inc., owes to Forsyth Drywall. Plaintiff, which is not a party to this appeal, filed an interpleader action in November 2004. Defendants interpled their respective claims, and each filed a summary judgment motion. On 26 September 2005 the trial court granted LSB's motion for summary judgment, from which order CM appeals.¹

Standard of Review

CM appeals the entry of summary judgment in favor of LSB. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). In the instant case:

Each party based its claim upon the same sequence of events. . . . Neither party has challenged the accuracy or authenticity of the documents establishing the occurrence of these events. Although the parties disagree on the legal significance of the established facts, the facts themselves are not in dispute. Consequently, we conclude that 'there is no genuine issue as to any material fact' surrounding the trial court's summary judgment order. We next consider whether the trial court correctly determined that [LSB] 'is entitled to a judgment as a matter of law.'

1. The subject action was brought in the Superior Court after Forsyth Drywall filed Chapter 7 bankruptcy, and only after defendants CM and LSB were granted relief from the automatic bankruptcy stay, 11 U.S.C. § 362.

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Adams v. Jefferson-Pilot Life Ins. Co., 148 N.C. App. 356, 359, 558 S.E.2d 504, 507 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 56 (2005)).

The issue before the trial court was determination of which defendant had a priority lien position with respect to monies owed by plaintiff to Forsyth Drywall. We agree with the parties that the relevant transactions are governed by the Uniform Commercial Code, N.C. Gen. Stat. § 25-1-101 *et. seq* (2005) (hereinafter the UCC). See N.C. Gen. Stat. § 25-9-109(a)(1) and (3) (2005). In our analysis, we have also made use of the Official Comment to various sections of the UCC:

This Court has noted that the commentary to a statutory provision can be helpful in some cases in discerning legislative intent. In *Bogle* this Court noted that since the commentary printed with the [statute at issue] was not enacted into law, it was not binding but, where proper, could be given substantial weight in our efforts to discern legislative intent.

Parsons v. Jefferson-Pilot Corp., 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993) (citing *State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989)) (other citation omitted).

Priority among competing security interests is governed generally by N.C. Gen. Stat. § 25-9-322 (2005), which states in relevant part that:

(a) . . . Except as otherwise provided in this section, priority among conflicting security interests . . . in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests . . . rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest . . . is first perfected, if there is no period thereafter when there is neither filing nor perfection.

N.C. Gen. Stat. § 25-9-322(a)(1) (2005) (emphasis added). The “filing covering the collateral” is a UCC-1 financing statement:

Pursuant to §§ 25-9-302(1) and 25-9-303, therefore, a financing statement that identifies the debtor, covers the collateral at issue, and contains the debtor’s signature must be filed in order to perfect a security interest of the kind at issue in this case. Because filing is a necessary element of perfection, § 25-9-303, the priority provision discussed above, § [25-9-322(a)(1)], essentially creates

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a rule in which the first creditor to file a sufficient financing statement has priority.

In Re Environmental Aspecs, Inc., 235 B.R. 378, 385 (E.D.N.C. 1999) (emphasis added) (citing *Finance Co. v. Finance Co.*, 36 N.C. App. 401, 245 S.E.2d 510 (1978)); see also N.C. Gen. Stat. § 25-9-310(a) (2005) (“Except as otherwise provided . . . a financing statement must be filed to perfect all security interests and agricultural liens.”). Thus, the first party to perfect its security interest in collateral by filing a UCC financing statement generally will have priority over subsequent lenders who rely on the same collateral to secure a loan.

The financing statement may be filed before the security agreement is drafted. See N.C. Gen. Stat. § 25-9-308(a) (2005) (A security interest is perfected if “it has attached and all of the applicable requirements for perfection in G.S. 25-9-310 through G.S. 25-9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.”).

“North Carolina’s is essentially a system of notice filing pursuant to which the notice provided by a financing statement ‘indicates merely that the secured party who has filed may have a security interest in the collateral described. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.’ ‘The purpose of a notice-filing statute is to . . . furnish[] to others intending to enter a transaction with the debtor a starting point for investigation which will result in fair warning concerning the transaction contemplated.’” *In Re Environmental Aspecs, Inc.*, 235 B.R. at 385-86 (quoting *Evans v. Everett*, 279 N.C. 352, 356, 183 S.E.2d 109, 112 (1971), and *TMMB Funding v. Associated Food Stores*, 136 A.D.2d 540, 542, 523 N.Y.S.2d 161, 163 (N.Y.A.D. 2d Dep’t 1988)).

Accordingly, “the financing statement’s purpose is to merely alert the third party as to the need for further investigation, never to provide a comprehensive data bank as to the details of prior security arrangements. The notice system of the Code places the burden of further inquiry upon anyone seeking additional information.” *Thompson v. Danner*, 507 N.W.2d 550, 561 (N.D. 1993) (citation omitted). In this regard, the Commentary to N.C. Gen. Stat. § 25-9-502 states in pertinent part that:

. . . This section adopts the system of ‘notice filing.’ What is required to be filed is . . . only a simple record providing a limited amount of information (financing statement). The financing state-

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ment may be filed before the security interest attaches or thereafter. . . . The notice itself indicates merely that a person may have a security interest in the collateral indicated. Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs. . . .

Subject to certain exceptions not at issue in the instant case, a financing statement is effective for five years, N.C. Gen. Stat. § 25-9-515(a) (2005), during which time it may be relied on to perfect multiple security interests, including those that attach after the filing of the financing statement. Commentary to N.C. Gen. Stat. § 25-9-502 states in pertinent part that:

Notice filing . . . obviates the necessity of refiling on each of a series of transactions in a continuing arrangement[.] . . . [A] financing statement is effective to encompass transactions under a security agreement not in existence and not contemplated at the time the notice was filed, if the indication of collateral in the financing statement is sufficient to cover the collateral concerned.

In the above described situation, the date of perfection relates back to the date the financing statement was filed, provided there has been no gap during which the financing statement had expired. *See, e.g., Finance Co. v. Finance Co.*, 36 N.C. App. 401, 245 S.E.2d 510 (1978) (upholding reliance on financing statement to perfect a second loan after the first loan was paid in full and terminated, as financing statement was not terminated and had not expired);² *In re K & P Logging, Inc.*, 272 B.R. 867, 876 (2001) (“financing statement which adequately describes collateral can serve to perfect a security interest not contemplated by the parties at the time of the filing of the financing statement”).

In the instant case, LSB perfected its security interest in the accounts receivable prior to CM, and thus has a superior security interest. The record on appeal includes the financing statement filed by LSB in 1999 listing accounts receivable as part of the collateral covered by the financing statement, as well as the security agreement executed by LSB and Forsyth Drywall on 26 June 2002, both of which

2. CM asserts, based on *dicta* in this case, that the result should be different under N.C. Gen. Stat. § 25-9-322 as it exists today. However, the statute has been amended several times since the 1977 *Finance Co.* opinion, and our reading of the present version does not indicate that a different result is required.

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identify accounts receivable as collateral for LSB's loan to Forsyth Drywall.³ LSB relied on the financing statement it filed in 1999 to perfect its security interest in collateral for its 2002 loan to Forsyth Drywall. Accordingly, its security interest was perfected upon execution of the security agreement on 26 June 2002. The record also includes the factoring agreement executed by CM and Forsyth Drywall on 20 June 2002, and the financing statement filed by CM in January 2003. These documents establish that LSB perfected its security interest on 26 June 2002, while CM did not perfect its security interest until six months later. Consequently, LSB's security interest in the accounts receivable has priority over that of CM.

We have considered and rejected CM's arguments to the contrary. Preliminarily, we note that the Official Comment to N.C. Gen. Stat. § 25-9-513 (2005) explains the implications of CM's failure to immediately perfect its security interest:

4. Buyers of Receivables. . . . While the security interest of a buyer of accounts . . . (B-1) is perfected, the debtor is not deemed to retain an interest in the sold receivables and thus could transfer no interest in them to another buyer (B-2)[.] . . . However, for purposes of determining the rights of the debtor's creditors and certain purchasers of accounts or chattel paper from the debtor, while B-1's security interest is unperfected, the debtor-seller is deemed to have rights in the sold receivables, and a competing security interest or judicial lien may attach to those rights. See sections 9-109 and 9-318 and [C]omment 5.

This is underscored by the Official Commentary to N.C. Gen. Stat. § 25-9-109:

5. . . . Following a debtor's outright sale and transfer of ownership of a receivable, the debtor-seller retains no legal or equitable rights in the receivable that has been sold. See section 9-318(a). This is so whether or not the buyer's security interest is perfected. . . . However, if the buyer's interest in accounts . . . is unperfected, a . . . perfected secured party, or qualified buyer can reach the sold receivable and achieve priority over (or take free of) the buyer's unperfected security interest under section 9-317. This is so . . . for the simple reason that sections 9-317, 9-318(b), and 9-322 make it so, as did former sections 9-301 and 9-312. Because the buyer's security interest is unperfected, for purposes

3. No party has suggested or argued that the financing statement concerning LSB's secured interest was not properly continued or renewed.

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of determining the rights of creditors of and purchasers for value from the debtor-seller, under section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-317 subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditor and other persons who qualify under that section.

CM concedes that it did not perfect its security interest until January 2003, well after LSB filed its financing statement. Although CM executed a security agreement with Forsyth Drywall prior to the date of LSB's 26 June 2002 loan to Forsyth Drywall, LSB nonetheless has priority because it was the first to file a financing statement.

CM bases its claim to a superior security interest on the existence of an amendment to the 1999 financing statement filed by LSB. Therefore, we next consider the legal significance of this amendment. As discussed above, the amendment states that it is a partial assignment of LSB's "security interest" in certain accounts receivable. CM argues that, with the mere filing of this amendment, LSB thereby "assigned away its security interest" and "assigned its rights under its financing statement."⁴ CM further asserts that after LSB filed the amendment to its original financing statement, "LSB's security interest was undisputedly unperfected."

LSB's amendment to the February 1999 financing statement does not purport either to (1) assign a "bare" financing statement not associated with any perfected security interest; or (2) to assign its priority position, freed from any security interest. Accordingly, we do not address the parties' arguments as to whether such assignments are possible under North Carolina statute and common law.

In the instant case, the financing statement amendment states that it is a partial assignment of "any security interest" that LSB had in certain accounts receivable that were collateral for LSB's loan to Forsyth Drywall. Under N.C. Gen. Stat. § 25-1-201(37) (2005), a security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation." (emphasis added). Thus, a security interest in collateral cannot be transferred unless the underlying debt is also assigned:

A security interest cannot exist, much less be transferred, independent from the obligation which it secures. The security inter-

4. CM does not argue, and we therefore do not address, whether the assignment by LSB of its security interest could constitute a contractual agreement by LSB to subordinate its security interest, N.C.G.S. § 25-9-339 (2005).

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est follows the debt. If the debt is not transferred, neither is the security interest.

In re Leisure Time Sports, 194 B.R. 859, 861 (9th Cir. B.A.P. 1996) (citing *Matter of DiSanto & Moore Associates, Inc.*, 41 Bankr. 935, 938 (N.D. Cal. 1984)) (other citations omitted). “This is not a mere technical legal requirement: To allow the assignee of a security interest to enforce the security agreement [absent transfer of the underlying debt] would expose the obligor to a double liability, since a holder in due course of the promissory note clearly is entitled to recover from the obligor.” *In re Belize Airways, Ltd.*, 7 B.R. 604, 607 (Bankr. S.D. Fla. 1980).

CM’s argument rests on assumptions drawn from the bare amendment to the financing statement. “Obviously, absent an existing security agreement in some form or fashion, a financing statement, without more, has no legal import or effect.” *U. S. v. Greenstreet*, 912 F. Supp. 224, 228 (N.D. Tex. 1999). “Furthermore, other jurisdictions which have considered the question involved in this action have held that it is the language in the security agreement, not the financing statement, that determines what collateral is subject to a security interest. . . . Accordingly, we hold that the security agreement, not the financing statement, establishes the scope or the limits of the security interest.” *Dowell v. D.R. Kincaid Chair Co.*, 125 N.C. App. 557, 561-62, 481 S.E.2d 670, 673 (1997) (citation omitted).

In the instant case, CM failed to include in the record either (1) any security agreement between LSB and Forsyth Drywall other than the one executed 26 June 2002; or (2) any security agreement between LSB and UC. Consequently, the record does not establish the extent of LSB’s security interest in the accounts receivable under the first loan to Forsyth Drywall. Nor does it include any showing that a portion of that first debt was assigned to UC. In the absence of a security agreement showing an assignment of LSB’s “security interest” in the accounts receivable, there is no evidence that such an assignment took place. Indeed, the record strongly suggests that the parties intended only to exchange their respective priority positions with respect to the accounts receivable. For example, the financing statement filed by LSB and the one terminated by UC bear different file numbers, indicating that UC’s loan to Forsyth Drywall was separate from LSB’s. The affidavit executed by UC executive Ivan Baker states that the amendment was filed because UC “required that LSB assign its first lien position in accounts receivable.” However, regardless of whether the record proves that LSB and UC exchanged priority posi-

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tions, it clearly fails to include a security agreement showing an assignment of Forsyth Drywall's original loan to UC, along with the corresponding security interest in certain accounts receivable.

"In reviewing the propriety of summary judgment, the appellate court is restricted to assessing the record before it. Only those pleadings and other materials that have been considered by the trial court for purposes of summary judgment and that appear in the record on appeal are subject to appellate review. If on the basis of that record it is clear that no genuine issue of material fact existed and that the movant was entitled to judgment as a matter of law, summary judgment was appropriately granted." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690, 340 S.E.2d 374, 377 (1986) (citing *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E.2d 137, 141 (1980), and *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971)).

As discussed above, CM has appealed a summary judgment order:

The moving party bears the burden of showing that no triable issue of fact exists. This burden can be met by proving: (1) that an essential element of the non-moving party's claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim.

Union v. Branch Banking & Trust Co., 176 N.C. App. 711, 714 n.2, 627 S.E.2d 276, 277-78 n.2 (2006). "Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000)), *aff'd*, 358 N.C. 137, 591 S.E.2d 520 (2004).

In the instant case, LSB introduced evidence that it perfected its security interest in Forsyth Drywall's accounts receivable several years before CM, and thus had a priority lien on the proceeds at issue. CM has not produced any evidence to refute this showing. Accordingly, we conclude that the trial court did not err by entering summary judgment in favor of LSB and that the trial court's order must be

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Affirmed.

Judge STEELMAN concurs.

Judge STEPHENS concurred prior to 31 December 2006.

IN THE MATTER OF: L.C., I.C., L.C., MINOR CHILDREN

No. COA06-575

(Filed 2 January 2007)

1. Constitutional Law— effective assistance of counsel— tardiness

Defendant was not denied effective assistance of counsel in a termination of parental rights proceeding even though his counsel was late on the second of five days of hearing after a lunch recess, because: (1) respondent failed to demonstrate how his attorney's tardiness caused him to be denied a fair hearing; and (2) there was no way of determining what respondent's attorney was precluded from asking based on her failure to make an offer of proof as required by N.C.G.S. § 8C-1, Rule 103.

2. Evidence— hearsay—mental health records of children

The trial court did not err in a termination of parental rights case by admitting, over objection, mental health records of two of the minor children, because: (1) even assuming arguendo that the records contain inadmissible hearsay, in a bench trial it is presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby; and (2) respondent has not pointed to any specific instances of hearsay upon which the trial court improperly relied.

3. Termination of Parental Rights— past abuse—reasonable probability of continued abuse—emotional and behavioral problems

The trial court did not abuse its discretion by terminating respondent father's parental rights, because: (1) the trial court found that all three children had been abused and exhibited symptoms of that abuse, and respondent admitted that he physi-

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cally beat and abused the children; (2) the court determined there was a reasonable probability that respondent would again abuse the children if they were returned to his care based on the testimony of respondent's individual therapist; (3) the children's therapist testified the children suffered various emotional and behavioral problems including posttraumatic stress disorder based on the abuse; and (4) although respondent pointed to the trial court's finding that all of the children's therapists think it would be in the children's best interests and assist in their therapy to have family sessions with respondent, the trial court found the family sessions could not occur until respondent had progressed and the children are at a stage where they can safely process the information, and further, the trial court found the children also require permanency to ensure continued progress in their therapy.

Appeal by respondent from order entered 25 January 2006 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 19 October 2006.

Durham County Attorney S. C. Kitchen, by Deputy County Attorney Thomas W. Jordan, Jr., for petitioner-appellee.

Peter Wood for respondent-appellant.

Wendy C. Sotolongo for guardian ad litem.

GEER, Judge.

Respondent father appeals from an order of the district court terminating his parental rights with respect to his minor children, L.C. ("Landon"), I.C. ("Irene"), and L.C. ("Lee").¹ On appeal, respondent primarily argues that he was denied effective assistance of counsel when the afternoon session of the termination of parental rights ("TPR") hearing began as scheduled, even though his attorney had not yet returned, and, when the trial court later did not allow respondent's attorney to ask petitioner's first afternoon witness introductory questions to "bring [respondent's counsel] up to speed." Respondent also contends that the trial court erred by admitting two of the minor children's mental health records, which he argues contain inadmissible hearsay. Finally, respondent asserts that several of the trial court's findings of fact are unsupported by the evidence, that

1. The pseudonyms Landon, Irene, and Lee will be used throughout the opinion to protect the children's privacy.

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they cannot support the court's conclusions of law, and that the trial court abused its discretion by terminating his parental rights.

We conclude that respondent has not shown that his attorney's tardiness deprived him of a fair hearing, and, therefore, respondent has failed to establish a claim for ineffective assistance of counsel. Additionally, as respondent has made no effort to rebut the presumption that the trial court disregarded any hearsay contained in the disputed medical records, he is not entitled to reversal on this ground. We also conclude that the trial court's findings are supported by clear, cogent, and convincing evidence, that they adequately support the court's conclusion that respondent abused his children, and that the trial court did not abuse its discretion by terminating his parental rights on this basis. Accordingly, we affirm.

Facts

On 31 July 2001, the Vance County Department of Social Services ("Vance County DSS") filed petitions alleging that Landon, Irene, and Lee were abused, neglected, and dependent juveniles. According to Vance County DSS, the children's mother was deceased, and respondent had inappropriately disciplined the children and left them home alone without proper supervision. Respondent does not contest that, prior to the filing of the petitions, he had hit all three children with belts and switches; had "back-handed" Landon in the eye; had struck Irene in the eye and on her face, shoulders, and back numerous times with belts, brooms, shoes, and drop cords; and had beaten Lee about the face and back.

The trial court issued non-secure custody orders on 31 July 2001, granting custody of the children to Vance County DSS. At the time they were taken from respondent's custody, all three children had marks, bruises, and scars indicative of both old and new abuse.

Because respondent missed numerous court dates, adjudication proceedings did not occur until January 2002. At the time of the adjudication hearing, respondent resided in a half-way house, was scheduled for vocational rehabilitation and anger management classes, and had signed both a protection plan and a family services case plan addressing proper discipline and supervision. On 23 October 2002, the trial court adjudicated the children to be abused, neglected, and dependent and ordered Vance County DSS to retain custody. The case plan at that time was reunification.

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The matter was transferred to Durham County Department of Social Services (“Durham County DSS”) on 25 October 2002. On 5 August 2003, following a review hearing, the trial court entered an order noting that respondent had presented letters showing that he had completed an outpatient substance abuse program as well as parenting classes and had been drug-free since June 2002. On the other hand, it appeared, according to guardian ad litem and Durham County DSS reports, that respondent may not have completed anger management classes, obtained a recommended psychological evaluation, or provided proof of stable housing and income. As a result, the court ordered respondent to obtain a psychological evaluation, continue with substance abuse treatment, maintain housing at the halfway house, attend anger management classes, and adhere to a restraining order requiring he stay 1,000 feet away from the children. The court, however, also decided to change the permanent plan to termination of parental rights and adoption, or, alternatively, guardianship with a relative.

On 31 December 2003, Durham County DSS filed a petition to terminate respondent’s parental rights. The trial court entered an order on 2 September 2004 finding that respondent had abused each of the three children and that, as a result, they suffered from post-traumatic stress disorder and other behavioral and emotional conditions. Because respondent was only in the beginning stages of anger management education, the court determined that he was not yet able to give the children appropriate care and supervision. Further, because respondent would still require “significant individual therapy to deal with his personal issue[s]” before he could safely parent his children, the court concluded that there was a reasonable probability that he would continue to abuse the children if they were returned to his care. Based on these findings of fact, the court terminated respondent’s parental rights.

Respondent appealed, and this Court reversed, concluding that the wording of the trial court’s “conclusion of law merely reiterate[d] ‘the grounds upon which the petition for termination [was] filed’ and [did] not conclude that any of those grounds actually exist.” *In re L.C.*, 174 N.C. App. 839, 622 S.E.2d 522, 2005 N.C. App. LEXIS 2600, at *5, 2005 WL 3291365, at *2 (2005) (second alteration original) (unpublished). We remanded for further proceedings, but left to the trial court’s discretion the decision as to whether to conduct an additional hearing on remand. *Id.*

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The trial court chose not to hold another hearing and, instead, entered a new order specifically finding that the “error in the termination order was a drafting error and the [c]ourt specifically did make the necessary conclusions of law, even if incorrectly drafted.” Following discovery of additional clerical errors, the trial court ultimately altered the disputed conclusion of law to begin by stating that “the grounds upon which termination exist are as follows . . .” (Emphasis added.) The order otherwise remained the same, and respondent again timely appealed.

I

[1] We turn first to respondent’s argument that he was denied effective assistance of counsel. Parents have a “right to counsel in all proceedings dedicated to the termination of parental rights.” *In re Oghenekeevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996). See also N.C. Gen. Stat. § 7B-602(a) (2005) (“In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel . . . unless that person waives the right.”). This right includes the right to effective assistance of counsel. *Oghenekeevebe*, 123 N.C. App. at 436, 473 S.E.2d at 396.

Respondent points to the fact that on the second of five days of hearing, the trial court commenced court following the luncheon recess even though his attorney had not yet arrived. At that time, Durham County DSS called its second witness of the day, Lee’s case manager, Elizabeth Fortune. At some unknown point during Ms. Fortune’s testimony, respondent’s attorney arrived. After Ms. Fortune was examined by the attorneys for Durham County DSS and the guardian ad litem, respondent’s attorney began her cross-examination as follows:

Q. I have a few questions for you, and some are to bring me up to speed from the beginning of your testimony.

What’s your full name?

A. Elizabeth Fortune.

Q. And what is your relation to [Lee]?

A. I’m his case manager and individual therapist.

Q. And what is your background and qualifications as—

THE COURT: You were not here when this went over, so you missed it. So just go on with your cross-examination. You’ve got

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her name and that's all you need. We started on time, you were not here. So skip over that and let's just go to testimony.

The record does not reflect how much of Ms. Fortune's direct testimony respondent's attorney missed on account of her tardiness.

A claim of ineffective assistance of counsel not only requires a respondent to show that counsel's performance was deficient, but also that "the deficiency was so serious as to deprive the represented party of a fair hearing." *Id.* Here, respondent has failed to demonstrate how his attorney's tardiness caused him to be denied a fair hearing.

Respondent has not identified what direct testimony his attorney missed, has not explained how the failure of his counsel to hear that testimony prejudiced him, and has not suggested what other introductory questions his attorney would have asked, if allowed, and how the preclusion of such questions impacted her ability to effectively represent respondent. Because respondent has failed to demonstrate the prejudice he suffered, he has likewise failed to establish his claim of ineffective assistance of counsel. *See In re B.P.*, 169 N.C. App. 728, 733, 612 S.E.2d 328, 332 (2005) (denying ineffective assistance claim when respondent "failed to specify what motions should have been made and what evidence could have been, but was not, presented before the trial court").²

Respondent alternatively argues that, even if he was not denied effective assistance of counsel, the trial court nevertheless erred by refusing to allow his attorney to cross-examine "a key witness" on "a relevant topic." Rule 103(a) of the Rules of Evidence provides:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

. . . .

2. We note that respondent's reliance on *State v. Colbert*, 311 N.C. 283, 316 S.E.2d 79 (1984), for his argument that he was denied his Sixth Amendment right to counsel during a "critical stage" of the proceeding is misplaced. Although the Sixth Amendment right to counsel does indeed attach during "critical stages" of criminal proceedings, *see, e.g., id.* at 285, 316 S.E.2d at 80, our Supreme Court has specifically held that this right does not apply to actions seeking the termination of parental rights. *State v. Adams*, 345 N.C. 745, 748, 483 S.E.2d 156, 157 (1997) ("The filing of a petition alleging abuse and neglect commences a civil proceeding. By its terms, the Sixth Amendment applies only to criminal cases.").

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- (2) . . . In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Here, when the trial court instructed respondent's attorney to "just go to testimony," she responded "[o]kay" and proceeded with her substantive cross-examination. We have no way of determining what respondent's attorney was precluded from asking because she failed to make an offer of proof. Accordingly, since respondent did not comply with Rule 103, we are not in a position to review this argument on appeal. These assignments of error are, therefore, overruled.

II

[2] Respondent next contends that the trial court erred by admitting, over objection, Lee's and Irene's mental health records, which respondent argues contain inadmissible hearsay. Even assuming, *arguendo*, that the records contain inadmissible hearsay, respondent has failed to demonstrate that the trial court's order must be reversed.

In a bench trial, "it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby." *Stanback v. Stanback*, 31 N.C. App. 174, 180, 229 S.E.2d 693, 696 (1976), *disc. review denied*, 291 N.C. 712, 232 S.E.2d 205 (1977). Under this principle, respondent bears the burden of showing that the trial court relied on the incompetent evidence in making its findings. *In re Huff*, 140 N.C. App. 288, 301, 536 S.E.2d 838, 846 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

Respondent has not met his burden. Although the children's mental health records span over 550 pages, respondent has not pointed to any specific instances of hearsay upon which he contends the trial court improperly relied. As respondent has failed to rebut the presumption that the trial court disregarded inadmissible evidence in making its findings, we overrule this assignment of error.

III

[3] Finally, we consider respondent's argument that the trial court erred by terminating his parental rights. During the adjudication stage of a termination of parental rights proceeding, the petitioner has the burden of proving by clear, cogent, and convincing evidence that one

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or more of the statutory grounds for termination set forth in N.C. Gen. Stat. § 7B-1111 (2005) exist. On appeal, this Court determines whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *Huff*, 140 N.C. App. at 291, 536 S.E.2d at 840.

As we find it dispositive, we review only the trial court's conclusion that grounds existed under N.C. Gen. Stat. § 7B-1111(a)(1), providing for termination of a respondent's parental rights when the parent has "abused or neglected the juvenile." An abused juvenile is one whose parent, among other things, inflicts upon the juvenile serious physical injury by other than accidental means, uses upon the juvenile cruel or grossly inappropriate procedures to modify behavior, or creates serious emotional damage to the juvenile evidenced by the juvenile's severe anxiety, depression, withdrawal, or aggressive behavior. N.C. Gen. Stat. § 7B-101(1) (2005). For the trial court to decide, following a termination of parental rights hearing, that a child is abused, the court "must admit and consider all evidence of relevant circumstances or events which existed or occurred before the adjudication of abuse, as well as any evidence of changed conditions in light of the evidence of prior abuse and the probability of a repetition of that abuse." *In re Greene*, 152 N.C. App. 410, 417, 568 S.E.2d 634, 638 (2002).

Here, the trial court found that all three children had been abused and exhibited symptoms of that abuse. Further, the court determined that there was a reasonable probability that respondent would again abuse the children if they were returned to his care. As to past abuse, the trial court found, and respondent candidly admits, that he physically beat and abused the children. This abuse, the trial court found, caused the children to suffer various emotional and behavioral problems, including post-traumatic stress disorder. Although respondent contests this finding of fact on appeal, it is amply supported by the testimony of each child's therapist.

In addition, the trial court's finding that respondent would likely continue the abuse if the children were returned to his custody was supported by the testimony of respondent's individual therapist, Carolyn Cordasko. She testified that his anger management progress had been "rather slow" and that he was still "fairly high-risk." She expressed her view that the parenting classes respondent had taken to learn about "alternatives to corporal punishment" had not been sufficient to train him about "appropriate parenting." She concluded

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that respondent's taking custody of his children at that time would be a significant "challenge." Indeed, Ms. Cordasko specifically noted that respondent had not yet experienced sufficient progress even to meet with his children and apologize for his past abuse. Based on this testimony, we hold that the trial court's finding that respondent was likely to continue to abuse the children was also supported by clear, cogent, and convincing evidence.³

Further, these findings of fact—regarding past abuse, the effect of the abuse on the children, and the probability of future abuse—were in turn sufficient to support the trial court's conclusion that grounds existed to terminate respondent's parental rights because he had abused his children. "Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court." *In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93-94 (2004).

As petitioner met its burden of proving that grounds for termination existed, the trial court was required to move to the disposition phase and consider whether termination was in the best interests of the children. N.C. Gen. Stat. § 7B-1110(a). The trial court's decision to terminate parental rights is reviewed under an abuse of discretion standard. *In re Nesbitt*, 147 N.C. App. 349, 352, 555 S.E.2d 659, 662 (2001). Here, the trial court did indeed find termination would be in the children's best interests, and, given respondent's history of severe physical abuse and ongoing battle with anger management even after three years of the children being in DSS custody, we see nothing manifestly unreasonable about this decision. See *In re McMillon*, 143 N.C. App. 402, 412-13, 546 S.E.2d 169, 176-77 (trial court did not abuse discretion by terminating respondent's parental rights when he admitted "disciplining" child by "smacking" and "whipping," and father had not made "meaningful clinical progress" during counseling), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

Respondent, however, points to the court's finding that "[a]ll of the children's therapists think that it would be in the children's best

3. We note that respondent contests the trial court's findings on this issue by challenging the court's decision not to hold another hearing and take additional evidence following this Court's remand in the initial appeal. Our prior opinion, however, left the issue of whether to hold an additional hearing to the trial court's discretion, and respondent makes no argument suggesting that the decision not to do so was manifestly unreasonable. In any event, respondent has pointed to nothing in the record indicating that he requested an opportunity to present additional evidence on remand, and, accordingly, we conclude this issue has not been properly preserved for appellate review. N.C.R. App. P. 10(b)(1).

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interests and assist in their therapy to have family sessions with [respondent] that involve some clarification, and apology and emotional reconciliation." Respondent contends that this finding required that the trial court conclude that termination of parental rights was not in the children's best interests.

The trial court, however, also found that such family sessions could not occur until respondent had "progressed to a stage where he can appropriately do those things, and . . . the children are at a stage where they can safely process the information and experience." Further, according to the court, the children also "require permanency to ensure continued progress in their therapy." We cannot find an abuse of discretion when the trial court concluded that the need for permanency required, in these circumstances, termination of parental rights.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

STATE OF NORTH CAROLINA v. XAVIER DOMINIQUE JOHNSON, DEFENDANT

No. COA05-1403

(Filed 2 January 2007)

1. Appeal and Error— preservation of issues—failure to object on constitutional grounds—failure to assert plain error

Although defendant contends the trial court violated his right to confrontation in a kidnapping and assault with a deadly weapon inflicting serious injury case by allowing the out-of-court statements of a witness, this assignment of error is dismissed because: (1) our appellate courts will only review constitutional questions raised and passed upon at trial; (2) defendant only lodged a general objection but did not object on constitutional grounds; and (3) defendant failed to assert plain error.

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2. Evidence— prior crimes or bad acts—victim’s lack of willingness to testify—shooting at mother’s house

Testimony by a kidnapping and assault victim that he did not want to testify at defendant’s trial and only did so after being jailed as a material witness, and that after he testified at a codefendant’s trial “they shot my momma’s house up,” but that defendant had not threatened him, did not constitute evidence of a prior bad act by defendant in violation of N.C.G.S. § 8C-1, Rule 404(b). Even presuming error, defendant was not prejudiced given the other evidence presented in the case.

3. Sentencing— aggravated sentences—special verdict

The trial court did not err in a kidnapping and assault with a deadly weapon inflicting serious injury case by aggravating defendant’s sentences, because: (1) at the time of defendant’s trial, the applicable statute was the unamended version of N.C.G.S. § 15A-1340.16 (2004) which required the trial court to find aggravating factors not admitted by defendant by a preponderance of the evidence and to make written findings; (2) North Carolina law permits the submission of aggravating factors to a jury using a special verdict; and (3) the trial court complied with the limitations for a special verdict set forth in *State v. Blackwell*, 361 N.C. 41 (2006).

4. Sentencing— aggravating factors—position of leadership or dominance of other participants

The trial court did not err in a kidnapping and assault with a deadly weapon inflicting serious injury case by concluding there was sufficient evidence to support submission of the aggravating factor that defendant occupied a position of leadership or dominance of other participants in the commission of the offenses, because: (1) a reasonable inference of defendant’s guilt may be drawn from the circumstances; and (2) the victim testified that defendant was driving the vehicle that the victim was forced into, that defendant drove while another person beat the victim, and that defendant told the other person that they should not let the victim go and that they should kill him.

5. Sentencing— aggravating factors—offenses committed with use of deadly weapon—acting in concert

The trial court did not commit plain error in a kidnapping and assault with a deadly weapon inflicting serious injury case by concluding there was sufficient evidence to support submission

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of the aggravating factor that the offenses were committed with the use of a deadly weapon even though defendant himself had no weapon, because: (1) our courts have upheld the application of the theory of acting in concert to the finding of aggravating factors; and (2) defendant's coparticipant committed the offenses with the use of a deadly weapon.

Appeal by defendant from judgments entered 4 February 2005 by Judge Robert H. Hobgood in the Superior Court in Durham County. Heard in the Court of Appeals 22 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Sandra Wallace-Smith, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant.

HUDSON, Judge.

In August 2003, the grand jury in Durham County indicted defendant for kidnapping and assault with a deadly weapon inflicting serious injury. On 3 February 2005, the trial jury found defendant guilty of both offenses. On 4 February 2005, after hearing evidence on aggravating factors, the jury found two aggravating factors, and the court sentenced defendant within the aggravated range to two consecutive terms of 42 to 60 months imprisonment. Defendant appeals. We conclude that there was no error.

The evidence tends to show that defendant, co-defendant Robert Johnson, and Robert Harris, all residents of Durham, had known each other for years. According to Harris, he and Robert Johnson had a disagreement over money owed for drugs in April 2003. On 20 April 2003, defendant was driving his car when Harris approached. While they were speaking, Robert Johnson pulled up, got out of his vehicle, and forced Harris into defendant's car at gunpoint. Robert Johnson beat Harris while defendant drove. Harris testified that he offered to give Robert Johnson money, if that was what he wanted, but that defendant told Robert Johnson not to let Harris go because he would tell. Harris also testified that defendant asked Robert Johnson what he was going to do and told him, "you better kill him." Eventually, when defendant stopped the car, Robert forced Harris out of the car and shot him in the leg, partially severing his genitals and causing permanent injury.

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[1] Defendant first argues that the trial court deprived him of his constitutional rights under the confrontation clause when it allowed the out-of-court statements of Ms. Felicia Turrain into evidence. At trial, Walter Harris testified that he had signed a notarized statement that defendant did not participate in the incident when Harris was kidnapped and shot. The State asked why Harris had signed this statement, and Harris stated that Felicia Turrain kept coming to the nursing school where he was taking classes and asking, “would I help [defendant] out, you know, to get out of this trouble, because really basically like he couldn’t afford to take another charge like this.” The court overruled defendant’s objection but instructed the jury not to consider the portion of the testimony that “ ‘he couldn’t afford to take another charge like this.’ ” It is well-established that our appellate courts will only review constitutional questions raised and passed upon at trial. N.C. R. App. P. 10(b)(1) (2004); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Here, defendant lodged a general objection but did not object on constitutional grounds. Where a defendant fails to properly object at trial, he may argue plain error on appeal. N.C. R. App. P. 10(c)(4) (2004). However, defendant has not asserted plain error and thus has waived plain error review. *State v. Dennison*, 359 N.C. 312, 312, 608 S.E.2d 756, 757 (2005). Accordingly, defendant’s constitutional argument is not properly before us, and we overrule this assignment of error.

[2] In his next argument, defendant contends that the trial court erred in admitting prejudicial evidence of other crimes. We disagree. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2003) provides that while “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person or that he acted in conformity therewith.” *Id.* However, such evidence may be admissible for other purposes such as to prove motive, opportunity, intent, and knowledge. *Id.* Here, the State elicited testimony from Mr. Harris that he had not wanted to testify at defendant’s trial and only did so after being arrested and jailed as a material witness. Harris testified that after he had testified at the earlier trial of a co-defendant in this case, “[t]hey shot my momma’s house up . . . When I say they, I’m not saying no names.” The State subsequently asked if Harris had avoided coming to court in the present case “[b]ecause of the threats from Xavier Johnson; is that right?” Harris responded ambiguously at first, but then stated “as far as, you know, the arguments that we may have had, as far as coming up to the trial, [defendant] ain’t threatened me. I mean him personally, no, being threatened, not him, you know.” We fail to see how such testimony constitutes evidence of a prior bad act by defendant.

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Furthermore, even presuming error, we are not persuaded that such error would have prejudiced defendant, given the other evidence presented in this case. We overrule this assignment of error.

[3] Defendant next argues that the trial court erred in aggravating defendant's sentences because it lacked authority to sentence defendant within the aggravated range. We disagree. We first note that defendant did not object to imposition of the aggravated sentence at trial, and the State contends that defendant thus failed to preserve this issue for our review. N.C. R. App. P. 10(b)(1). However, this Court has held that "an error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *State v. Harris*, 175 N.C. App. 360, 362-63, 623 S.E.2d 588, 590 (2006) (internal citations and quotation marks omitted). Accordingly, as in *Harris*, "despite defendant's failure to object to the sentence, the issue is properly before this Court." *Id.*

In 2004, the United States Supreme Court decided *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The Court held that a defendant's constitutional right to trial by jury requires that jurors find, beyond a reasonable doubt, facts which increase the penalty for a crime "beyond the prescribed statutory maximum," defining "statutory maximum" as the maximum sentence allowed by a jury's verdict or from a defendant's admissions, without additional judge-made findings of fact. *Id.* at 303-04, 159 L. Ed. 2d at 413-14. In *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), withdrawn by 360 N.C. 569, 635 S.E.2d 899 (2006), the North Carolina Supreme Court reviewed the effect of *Blakely* on the North Carolina structured sentencing act ("the Act"). The Court concluded that N.C. Gen. Stat. § 15A-1340.16 (2004), the portion of the Act which required trial judges to consider evidence of aggravating factors not found by a jury or admitted by the defendant, and which permitted imposition of an aggravated sentence upon judicial findings of such aggravating factors by a preponderance of the evidence, violated the Sixth Amendment as interpreted in *Blakely*. 359 N.C. at 438-39, 615 S.E.2d at 265. The Court held that all of its holdings in *Allen* applied to cases in which "the defendants had not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final." *Id.* at 427, 615 S.E.2d at 258. Here, defendant was indicted on 11 August 2003, judgment was entered 4 February 2005, and defendant filed notice of appeal on 5 February 2005. *Allen*

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was filed on 1 July 2005; thus, defendant's case was pending on direct review when *Allen* was certified. Although *Allen* was later withdrawn on other grounds (for its determination that *Blakely* errors were structural and not subject to harmless error analysis), *Allen* was controlling precedent at the time defendant was sentenced.

The General Assembly had not amended the Act at the time of defendant's trial. When the legislature did amend N.C. Gen. Stat. § 15A-1340.16 on 30 June 2005, it stated that:

This act is effective when it becomes law. Prosecution for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

2005 N.C. Sess. Laws 145. Thus, at the time of defendant's trial, the applicable statute was the unamended version of N.C. Gen. Stat. § 15A-1340.16(2004), which required the trial court to find aggravating factors not admitted by defendant by a preponderance of the evidence and to make written findings. *Id.* Aware of the problems presented by *Blakely*, the trial court here presented the aggravating factors to the jury and the jury found these factors beyond a reasonable doubt. The trial court wrote by hand on the judgment form, "found by the jury beyond a reasonable doubt," below the findings of aggravating factors.

Defendant does not assert that the trial court violated his rights under *Blakely*, but that the trial court acted without authority when it fashioned its own remedy to comply with *Blakely* before our legislature had amended the structured sentencing act. However, the North Carolina Supreme Court recently addressed this issue, where "the trial court allegedly lacked a procedural mechanism by which to submit the challenged aggravating factor to the jury," and concluded that North Carolina law "permits the submission of aggravating factors to a jury using a special verdict." *State v. Blackwell*, 361 N.C. 41, 46, — S.E.2d —, — (2006).

A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict. Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that special verdicts are permissible in criminal

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cases. Special verdicts, however, are subject to certain limitations. After the United States Supreme Court decision in *United States v. Gaudin*, a special verdict in a criminal case must not be a true special verdict—one by which the jury only makes findings on the factual components of the essential elements alone—as this practice violates a criminal defendant's Sixth Amendment right to a jury trial. Thus, trial courts using special verdicts in criminal cases must require juries to apply law to the facts they find, in some cases straddl[ing] the line between facts and law as a mini-verdict of sorts. Furthermore, requests for criminal special verdicts must require the jury to arrive at its decision using a beyond a reasonable doubt standard, since a lesser standard such as preponderance of the evidence would violate a defendant's right to a jury trial. Aside from these limitations, however, we are aware of no limits on our trial courts' broad discretion to utilize special verdicts in criminal cases when appropriate. It is difficult to imagine a more appropriate set of circumstances for the use of a special verdict than those existing in the instant case, in which a special verdict in compliance with the above limitations would have safeguarded defendant's right to a jury trial under *Blakely [P]rior to the Blakely Act, special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury.*

Id. Here, we conclude that the trial court complied with the limitations for a special verdict set forth in *Blackwell*, and thus we overrule this assignment of error.

[4] Defendant also contends that there was insufficient evidence to support submission of the aggravating factors to the jury. We disagree. The jury was instructed and found that the defendant occupied a position of leadership or dominance of other participants in the commission of the offenses of assault with a deadly weapon causing serious injury and second-degree kidnapping. Defendant objected to the submission of this aggravating factor. In determining whether there was sufficient evidence to present to the jury, we review the evidence in the light most favorable to the State. *State v. Thomas*, 296 N.C. 236, 245, 250 S.E.2d 204, 208 (1978). The State is entitled to every reasonable inference to be drawn from the evidence and to have all contradictions in the evidence resolved in its favor. *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). The ultimate question is “whether a reasonable inference of the defendant's guilt may be drawn from the circumstances.” *Id.* If the evidence supports a rea-

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sonable inference of defendant's guilt, "it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *Thomas*, 296 N.C. at 244, 250 S.E.2d at 209. Here, Mr. Harris testified that defendant was driving the vehicle that Harris was forced into, that defendant drove while Robert Johnson beat Harris, and that defendant told Robert Johnson that they should not let Harris go and that they should kill him. Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to support the instruction on occupying a position of leadership or dominance.

[5] Defendant also asserts that there was insufficient evidence to support the aggravating factor submitted and found by the jury that the offenses were committed with the use of a deadly weapon. As defendant did not object to this charge at trial, we review this claim for plain error. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 379 (1983). It is undisputed that the offenses committed by Robert Johnson were committed with the use of a deadly weapon. It is also undisputed that defendant had no weapon. Defendant asserts that the trial court may not submit an aggravating factor based on a theory of acting in concert, citing *State v. Oliver*, 309 N.C. 326, 365, 307 S.E.2d 304, 329 (1983). However, *Oliver* does not stand for this proposition and defendant has not cited any other law in support of this argument. Indeed, our Courts have upheld the application of the theory of acting in concert to the finding of aggravating factors. See *State v. Barnes*, 333 N.C. 666, 686, 430 S.E.2d 223, 234 (1993); *State v. Collier*, 72 N.C. App. 508, 512, 325 S.E.2d 256, 258 (1985). Where two or more persons join in a plan to commit a crime, each of them, if actually or constructively present, is guilty as a principal if the other commits that particular crime. *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997). We conclude that the court did not commit plain error in submitting the aggravating factor that the offenses were committed with the use of a deadly weapon based on a theory of acting in concert. We overrule this assignment of error.

No error.

Judges WYNN and TYSON concur.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

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STATE OF NORTH CAROLINA v. COURTNEY SEMAJ WADE

No. COA06-302

(Filed 2 January 2007)

1. Sentencing— prior record level—use of worksheet—stipulation

The trial court did not err in determining defendant's prior record level from the State's sentencing worksheet where defense counsel immediately began describing mitigating factors without objecting to any of the convictions on the worksheet and thus stipulated to those convictions.

2. Evidence— fingerprint—impression during crime

The trial court did not err by denying defendant's motion to dismiss charges of assault, safecracking, robbery and first-degree burglary where the State's only evidence linking defendant to the crimes was a fingerprint; defendant stated to a detective that he had never been to the victim's house; the victim testified that he was the only person with a key to the closet where the fingerprint was found; and the victim testified that the robbers broke into the closet.

3. Kidnapping— restraint and removal—incident to other crimes

The trial court erred by denying a motion to dismiss a kidnapping charge where robbery and assault were also charged, and the confinement, restraint or removal were part of those crimes.

Appeal by defendant from judgment entered 1 July 2005 by Judge Henry E. Frye, Jr. in Moore County Superior Court. Heard in the Court of Appeals 12 October 2006.

Attorney General Roy Cooper, by Melissa L. Trippe, Special Deputy Attorney General, for the State.

Haral E. Carlin for defendant-appellant.

STEELMAN, Judge.

Courtney Semaj Wade ("defendant") presents the following issues on appeal: (1) whether the trial court properly determined his prior record level; (2) whether the trial court erroneously denied defend-

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ant's motion to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury, safecracking, robbery with a dangerous weapon, and first degree burglary at the close of the State's evidence and at the close of all the evidence; and (3) whether the trial court erroneously denied defendant's motion to dismiss the charge of second degree kidnapping at the close of the State's evidence and at the close of all the evidence. For the reasons set forth herein, we vacate in part and find no error in part.

Evidence presented at trial tended to show that James Edward Parker, Jr. ("Parker"), moved to Southern Pines in September of 2001 after inheriting a house from his grandmother. Parker's uncle had previously lived in the house. Parker was renovating the house. His son was handling the renovations, and placed a safe in the bathroom closet to keep cash for making payments to contractors working on the house. Parker testified that \$10,000.00 in cash was in the safe on 30 November 2003.

Several days prior to 30 November 2003, Parker noticed an unfamiliar female walking on his property. He invited her into his house and offered her a drink. While she was in the house she went into the bathroom. Parker gave her \$30.00 when she said she needed money for her daughter.

On the night of 30 November 2003 two intruders entered the house of Parker. Parker was awakened by a noise in the house. He found two males in his living room. They began punching him, striking him with a gun, and asking him where the money was. The intruders stated they heard that there was a safe in the house. Parker told the intruders that the safe was located in the bathroom but that he did not have a key to the safe. The intruders proceeded to the bathroom but had difficulty in opening the safe. One of the intruders again hit Parker and attempted to drag him through the living room while the other tried to open the safe. After kicking the intruder, Parker was able to escape, and run to his neighbor's house for help. Parker did not recognize the intruders or get a good look at their faces.

Marvin Wright ("Wright"), a detective with the Southern Pines Police Department, responded to Parker's house. In canvassing the house for evidence, Wright noticed a safe in the bathroom closet which had been broken into. There were no legible fingerprints on the safe. In the same closet above the safe was a box containing a microscope. Two latent fingerprints were discovered on the microscope box. These were subsequently identified by Kathleen Farrell, a foren-

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sic fingerprint examiner with the Fayetteville Police Department, to be those of defendant.

On 9 December 2003, a search warrant was executed for the house of Tim and Rasheema Wade Kelly, who were relatives of defendant. A handgun, a magazine with nine rounds, \$1800.00 in \$100 bills, and a tire iron were found on the premises. A blood and DNA analysis of the handgun was performed by Special Agent Jennifer Elwell. The DNA on the handgun matched that of Parker. Defendant was arrested on 12 December 2003 with five \$100 bills in his possession.

A former girlfriend of defendant provided alibi testimony for defendant at trial. She testified that they were in Fayetteville, North Carolina, on the evening of 30 November 2003.

The jury returned verdicts of guilty of assault with a deadly weapon inflicting serious injury, first-degree kidnapping, first-degree burglary, robbery with a dangerous weapon, and safecracking. The trial court arrested judgment in part reducing the charge of first-degree kidnapping to second-degree kidnapping because defendant was also convicted and sentenced on the assault charge. In four separate judgments defendant was given consecutive active sentences totaling 208-288 months imprisonment. From these judgments, defendant appeals.

Prior Record Level

[1] In his first argument, defendant contends that the trial court erred in determining defendant's prior convictions and prior record level. We disagree.

Defendant argues that the State failed to meet the requirements of N.C. Gen. Stat. § 15A-1340.14(f) to prove a prior conviction. Prior convictions can be proved by:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

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N.C. Gen. Stat. § 15A-1340.14(f) (2005). The State bears the burden of proving that a prior conviction exists and that the defendant is the same person as the offender in the prior conviction. *State v. Eubanks*, 151 N.C. App. 499, 505, 565 S.E.2d 738, 742 (2002). Standing alone, a sentencing worksheet prepared by the State listing a defendant's prior convictions is insufficient proof of prior convictions. *Id.* A stipulation does not require an affirmative statement and silence may be deemed assent in some circumstances, particularly if the defendant had an opportunity to object and failed to do so. *State v. Alexander*, 359 N.C. 824, 828-29, 616 S.E.2d 914, 917-18 (2005).

During sentencing, the following colloquy occurred:

THE COURT: Are you ready to proceed with sentencing, Mr. D. A.?

[PROSECUTOR]: Yes, Your Honor, the State is ready.

THE COURT: All right. Are you ready to proceed with sentencing, Mr. Donadio [defense counsel]?

MR. DONADIO: Yes, Your Honor.

THE COURT: All right.

[PROSECUTOR]: May I approach, Your Honor?

THE COURT: Yes, sir.

So the State contends his prior record level will be II?

[PROSECUTOR]: That's correct, Your Honor.

THE COURT: All right. Mr. Donadio, I'll hear from you on sentencing, sir.

MR. DONADIO: Your Honor, Courtney is here this week supported by various members of his extended family. He has no prior conviction approaching this type of incident. He is a young man. He still has a lot maybe to learn and a lot that he can accomplish, and I would ask you to consolidate where appropriate and give him the benefit of a second chance at some point.

THE COURT: All right. So you would contend at least one mitigating factor; he has a support system in the community?

Because a sentencing worksheet was the only proof submitted to the trial court, we look to the dialogue between counsel and the trial court to determine whether defendant stipulated to the prior convictions which raised his prior record level to II. *State v. Cromartie*, 177

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N.C. App. 73, 80, 627 S.E.2d 677, 682 (2006). In the instant case, defendant had an opportunity to object and instead of doing so, began describing mitigating factors to the trial court. At no time did defendant object to any of the convictions on the worksheet. *See Alexander*, 359 N.C. at 830, 616 S.E.2d at 918. We hold that, under the circumstances, this constituted stipulation to defendant's prior convictions. This assignment of error is without merit.

Denial of Motion to Dismiss Charges Other than Kidnapping

[2] In his second argument, defendant contends that the trial court erred in denying his motion to dismiss the charges of assault with a deadly weapon with intent to kill inflicting serious injury, safecracking, robbery with a dangerous weapon, and first degree burglary for insufficient evidence at the close of the State's evidence and at the close of all the evidence. We disagree.

When considering a motion to dismiss, the trial court must determine whether there is sufficient evidence of each essential element of the offenses charged or lesser included offenses, and whether the defendant was in fact the perpetrator. *State v. Mercer*, 317 N.C. 87, 96-97, 343 S.E.2d 885, 890-91 (1986). If there is sufficient evidence to submit the case to the jury, the motion to dismiss must be denied. *Id.*

Circumstantial evidence, if sufficient to draw a reasonable inference of the defendant's guilt, should be submitted to the jury for determination of actual guilt. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967). Fingerprint evidence, if the only evidence circumstantial or otherwise tending to prove the defendant was the perpetrator of the crime charged, is insufficient to survive a motion to dismiss unless the jury can reasonably infer that the fingerprints could only have been impressed at the time of the crime. *State v. Irick*, 291 N.C. 480, 491-92, 231 S.E.2d 833, 841 (1977). Statements by the defendant that he had never been at the crime scene are sufficient to show that a fingerprint lifted from the premises could only have been impressed at the time of the crime. *See State v. Miller*, 289 N.C. 1, 5, 220 S.E.2d 572, 575 (1975).

In the instant case, the evidence before the trial court was sufficient to submit the case to the jury. The State's only evidence linking defendant to the crimes charged was a latent fingerprint on a microscope box that was kept in the same bathroom closet as the safe. The fingerprint was identified by an expert to be defendant's. Defendant stated to the detective processing him upon arrest that he had never

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been to the victim's house. Defendant did not object to the admission of this evidence at trial and has not assigned plain error on appeal. In addition, Parker testified that he was the only person who had a key to the door of the bathroom closet, where the safe and microscope box were kept. Parker further testified that the robbers broke into the bathroom closet. We hold that the trial court did not err in denying defendant's motion to dismiss these charges. This argument is without merit.

Denial of Motion to Dismiss Kidnapping Charge

[3] In his third argument, defendant contends that the trial court erred in denying his motion to dismiss the kidnapping charge at the close of the State's evidence and at the close of all the evidence because the State presented insufficient evidence of confinement, restraint, or removal separate from that inherent in the crime of robbery with a dangerous weapon. We agree.

Our standard of review is the same as that for the previously discussed motion to dismiss.

A defendant is guilty of kidnapping if he unlawfully confines, restrains, or removes an individual from one place to another without their consent if done for the purpose of facilitating the commission of a felony. N.C. Gen. Stat. § 14-39(a)(2) (2005). Our case law requires confinement, restraint, or "removal separate and apart from that which is an inherent, inevitable part of the commission of another felony." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981). "To permit separate and additional punishment where there has been only a technical asportation, inherent in the other offense perpetrated, would violate a defendant's constitutional protection against double jeopardy." *Id.*

In the instant case, due to the severe beating administered to Parker by the robbers, his testimony of exactly what occurred and the temporal sequence of events is far from clear. Taken in the light most favorable to the State, it appears that the taller robber (defendant) initially grabbed Parker. The other robber struck Parker with his fists. Parker was subsequently struck with a pistol, sank to the ground, and was then kicked. During the beating, the robbers repeatedly asked, "Where is the money at?" They also asked about the location of the safe:

Q: At some point, Mr. Parker, did you tell them where the safe was?

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A: Yes. I had to because they started dragging me towards the bathroom and I started feeling even more closed in, and all the while they were still beating me in the head and in the face with the gun.

Parker testified on several occasions that the robbers were “starting” to drag him. Based upon this testimony, Parker would only have been moved for a very short distance. At some point, defendant went to the bathroom, looking for the safe, leaving Parker with the other robber. This robber grabbed Parker under both arms, then grabbed him by the legs, removing one of his socks. When the robber was grabbing Parker’s legs, Parker kicked him and used the opportunity to effect his escape. Parker thought that the robber may have been preparing to tie him up, but there was no testimony that the robber attempted to tie him up or actually did tie him up.

The trial court charged the jury that any confinement, restraint, or removal had to be a separate act independent of and apart from robbery with a dangerous weapon or assault with a deadly weapon inflicting serious injury.

The State argues that the facts before us are similar to those in *State v. Raynor*, 128 N.C. App. 244, 495 S.E.2d 176 (1998), an armed robbery case in which this Court held that the evidence supported a separate conviction for kidnapping. We disagree. In *Raynor*, the victim was removed from the bedroom, where the robbery took place, to the kitchen, for purposes of tying the victim up. *Id.* 128 N.C. App. 247, 495 S.E.2d 177. The facts in the instant case are distinguishable from those in *Raynor*. Parker was not removed from one room to another nor was there any evidence of binding. These facts are more similar to *State v. Ross*, 133 N.C. App. 310, 315, 515 S.E.2d 252, 256 (1999), where this Court vacated the defendant’s second-degree kidnapping charge because the victim was not exposed to a greater danger than that inherent in the armed robbery. In *Ross*, the defendant and his accomplices took the victim to his bedroom looking for property to steal. Because the victim was taken to his bedroom as part of the armed robbery, he was not exposed to a greater danger than that inherent in the armed robbery. *Id.*

This is a peculiar case, in that defendant was charged not just with robbery with a dangerous weapon but also with assault. The trial court correctly charged the jury that the confinement, restraint, or removal had to be separate and apart from that inherent in the commission of the other two offenses. Any confinement and restraint was

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inherent in the assault of Parker. The removal was inherent in the robbery with a dangerous weapon, based upon Parker's testimony that the robbers were "dragging" him toward the location of the safe. While the acts of defendant and his confederate were vile and reprehensible, we are unable to discern how any confinement, restraint, or removal of Parker was not an inherent and integral part of either the robbery with a dangerous weapon or the assault. Under the rationale of *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446, we are compelled to vacate defendant's conviction for second-degree kidnapping.

Having vacated the second-degree kidnapping charge, it is unnecessary for us to address defendant's other assignment of error related to that charge. *See Ross*, 133 N.C. App. at 315, 515 S.E.2d at 256.

Defendant's conviction for second-degree kidnapping is vacated. We find no other error in defendant's trial.

VACATED in part; NO ERROR in part.

Judge GEER concurs.

Judge STEPHENS concurs prior to 31 December 2006.

STATE OF NORTH CAROLINA v. DAVID LEE BARKSDALE, JR., DEFENDANT

No. COA06-239

(Filed 2 January 2007)

1. Firearms and Other Weapons— possession of firearm— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm even though defendant contends the State failed to present substantial evidence showing he had possession of the handgun that was resting in the grass about six inches from his outstretched hand, because there was ample circumstantial evidence suggesting that defendant had possession of the gun before he was tackled to the ground by the police officers.

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2. Assault—deadly weapon on government officer—motion to dismiss—sufficiency of evidence—unequivocal appearance of attempt

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government officer, because: (1) in North Carolina an assault is not simply an overt act or an attempt, but also the unequivocal appearance of an attempt; (2) even if defendant's conduct of reaching for the gun was not in itself an overt act or an attempt to do some immediate physical injury, his conduct qualified at least as the unequivocal appearance of an attempt to harm the officers with the gun; (3) defendant committed this unequivocal appearance of an attempt with force and violence when in addition to the presence of the gun, defendant struggled intensely with three officers and was not subdued until he received several blows to the head; and (4) the officers' testimony under the circumstances was sufficient evidence to establish that a person of reasonable firmness would have feared immediate bodily harm.

3. Assault—instruction—attempted assault—plain error

The trial court committed plain error by instructing the jury on attempted assault with a deadly weapon upon a government officer because that offense does not exist in this state.

Appeal by defendant from judgments entered 21 October 2005 by Judge Judson D. Deramus, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 12 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Pomper, for the State.

Crumpler Freedman Parker & Witt, by Jones P. Byrd, Jr., for defendant-appellant.

GEER, Judge.

Defendant David Lee Barksdale, Jr. appeals from his convictions for two counts of attempted assault with a deadly weapon on a government officer, possession of a firearm by a convicted felon, and resisting a public officer. On appeal, defendant argues that the trial court erred in denying his motion to dismiss and, in any event, erred in instructing the jury on attempted assault since attempted assault is "an offense that does not exist."

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While we hold that defendant's motion to dismiss was properly denied and the case submitted to the jury, we agree with defendant that the court erred in submitting the charge of attempted assault with a deadly weapon on a government officer to the jury. Under *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *appeal dismissed and cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99 (1972), we are bound to conclude that "attempted assault" is not a triable offense in North Carolina. Accordingly, we must vacate defendant's convictions on the two counts of attempted assault with a deadly weapon on a government officer and remand the matter for further proceedings.

Facts

The State's evidence at trial tended to show the following facts. On 6 January 2005, defendant was outside of the Maryland Avenue Apartments in Winston-Salem, North Carolina. As an unmarked car carrying four police officers entered the parking lot of the apartment complex, defendant ducked behind a vehicle. When the officers exited their car and identified themselves to defendant as the police, defendant ran away.

The officers chased defendant for a distance of three to four-tenths of a mile. Officer Hege was the first to catch up with defendant, and he tackled defendant to the ground. Two other officers—Officers McKaughon and Mulgrew—arrived a few seconds later. While on the ground, defendant struggled vigorously with the officers as they tried to restrain and handcuff him.

The officers had managed to handcuff defendant's right wrist when Officer Hege noticed a chrome-plated handgun in the grass approximately six inches from defendant's left hand. Although none of the officers saw defendant touch the gun, they testified that defendant was reaching for the gun with his outstretched hand. Officer Hege alerted the other officers to the gun, and they proceeded to apply even greater force to subdue defendant. After defendant received several blows to the head, the officers succeeded in subduing defendant. The officers then retrieved the gun that was lying in the grass. The gun was dry and warm to the touch even though the ground was wet from rain earlier in the evening and the weather was cool.

Defendant was indicted on two counts of assault with a deadly weapon on a government official, one count of possession of a firearm by a felon, one count of possession of a stolen firearm, one count of resisting a public officer, and as having attained the status of habit-

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ual felon. The case proceeded to trial and, at the close of the State's evidence, the trial court denied defendant's motion to dismiss. The trial court, however, decided to instruct the jury only as to "attempted assault," with the instructions derived from a combination of the pattern jury instructions for a general attempt charge, N.C.P.I.—Crim. 201.10, and for assault with a firearm upon a government officer, N.C.P.I.-Crim. 208.95B.

The jury convicted defendant of the two counts of attempted assault with a deadly weapon on a government officer, as well as the single counts of resisting a public officer, and possession of a firearm by a felon. After defendant pled guilty to being a habitual felon, the trial court sentenced defendant to consecutive terms of imprisonment of 130 to 165 months for firearm possession and 133 to 169 months for the attempted assault offenses and resisting a public officer. Defendant timely appealed.

I

[1] We first address defendant's arguments relating to the denial of his motion to dismiss. In ruling on a criminal defendant's motion to dismiss, the trial court must determine whether the State has presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *Id.* (quoting *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). When considering the issue of substantial evidence, the trial court must view all of the evidence presented "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

With respect to the charge of possession of a firearm by a felon, defendant argues that the State failed to present substantial evidence showing he had "possession" of the handgun that was resting in the grass about six inches from his outstretched hand. Possession of a weapon may be either actual or constructive. "Actual possession requires that a party have physical or personal custody of the item. A person has constructive possession of an item when the item is not in his physical custody, but he nonetheless has the power and intent to

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control its disposition.” *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (internal citation omitted).

Based upon our review of the record, we conclude that there was ample circumstantial evidence suggesting that defendant had possession of the gun before he was tackled to the ground by the police officers. The officers testified that a warm, dry chrome-plated handgun was located in the wet grass only six inches from defendant’s hand. A jury could reasonably conclude that, since the grass was wet and the weather cool, the gun, found at the precise spot where the police tackled defendant, likely fell from defendant’s hand or elsewhere from his person. Moreover, the officers testified defendant was reaching for the gun—an indication that defendant was aware of the gun’s presence. Such evidence goes well beyond mere conjecture that defendant had possession of the gun. See *State v. Glasco*, 160 N.C. App. 150, 157, 585 S.E.2d 257, 262 (holding that circumstantial evidence was sufficient to withstand a motion to dismiss charge of firearm possession because defendant was found carrying a bag containing firearm residue and a gun was found concealed in a pile of tires near where defendant had been recently spotted), *disc. review denied*, 357 N.C. 580, 589 S.E.2d 356 (2003). The trial court thus properly denied defendant’s motion to dismiss the firearm possession charge.

[2] With respect to the charge of assault with a deadly weapon on a government officer, the State was required to present substantial evidence that defendant had: “(I) commit[ted] an assault; (II) with a firearm or other deadly weapon; (III) on a government official; (IV) who is performing a duty of the official’s office.” *State v. Spellman*, 167 N.C. App. 374, 380, 605 S.E.2d 696, 701 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 325, 611 S.E.2d 845 (2005). The “assault” element, based on the common law of North Carolina, is defined as “‘an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.’” *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967) (quoting 1 Strong’s N.C. Index, *Assault and Battery* § 4 (1957)); see also *Spellman*, 167 N.C. App. at 384, 605 S.E.2d at 703 (articulating same definition of assault).¹

1. The Supreme Court in *Roberts* also acknowledged a second, different definition of assault called the “show of violence” rule: “The ‘show of violence rule’ consists of a show of violence accompanied by reasonable apprehension of immediate bodily

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The essential disagreement of the parties is whether an assault with a firearm can be accomplished where the perpetrator reaches for, but does not succeed in touching, the weapon. The parties did not submit any case law to the trial court or to this Court that would dispositively resolve this disagreement. Likewise, in our own research, we have not discovered any directly analogous North Carolina case.

Nonetheless, after carefully considering the applicable definition of assault, we must conclude that the elements of the offense were supported by the evidence produced at trial. In North Carolina, an assault is not simply “an overt act or an attempt” but also “the unequivocal appearance of an attempt.” Even if defendant’s conduct—his reaching for the gun—was not in itself “an overt act or an attempt . . . to do some immediate physical injury,” his conduct qualifies at least as “the unequivocal appearance of an attempt” to harm the officers with the gun.

Moreover, as demonstrated by the evidence introduced at trial, defendant committed this unequivocal appearance of an attempt with force and violence. Indeed, in addition to the presence of the gun, the evidence also showed that defendant struggled intensely with three officers and was not subdued until he received several blows to the head. We also find, under the circumstances, that the officers’ testimony was sufficient evidence to establish that a person of reasonable firmness would have feared immediate bodily harm.

In short, we are not persuaded by defendant’s contention that an assault did not take place because he never “made physical contact with the weapon.” In light of the evidence showing that the gun was only inches from defendant’s outstretched hand and that defendant was actively, forcefully, and to some degree successfully resisting the officers’ attempt to arrest him, we do not believe, in light of our State’s definition of assault, that defendant’s failure to physically touch the weapon precludes the commission of an assault with the firearm. *See State v. Dickens*, 162 N.C. App. 632, 636-37, 592 S.E.2d 567, 571-72 (2004) (with respect to charge of assault with a firearm on a government officer, noting that “[i]n proving the element of assault, the State does not have to show the defendant pointed a firearm at a law enforcement officer”). As there is no serious dispute that defendant’s actions satisfied the remaining elements of the offense (i.e., he directed his conduct toward a government officer who was attempt-

harm or injury on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed.” 270 N.C. at 658, 155 S.E.2d at 305. That definition of assault was not used in this case.

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ing to perform his official duties), we hold that the State presented sufficient evidence to survive defendant's motion to dismiss.

II

[3] Defendant next argues that the trial court committed plain error in instructing the jury regarding a charge of "attempted assault" because "it amounts to plain error for a trial court to instruct a jury on an offense that does not exist." Based on controlling precedent, we agree with defendant.

The trial court's decision to instruct the jury as to attempted assault is irreconcilable with *State v. Currence*, 14 N.C. App. 263, 188 S.E.2d 10, *appeal dismissed and cert. denied*, 281 N.C. 315, 188 S.E.2d 898-99 (1972). In *Currence*, the jury returned an initial "verdict purporting to find defendant guilty of 'attempted assault with a deadly weapon'" *Id.* at 265, 188 S.E.2d at 12. The trial judge refused to accept that verdict and ordered the jurors to resume deliberations, after which they returned a different verdict. On appeal, the defendant argued that the initial verdict of guilty of "attempted assault with a deadly weapon" should have been accepted by the trial court. This Court disagreed, holding that "[i]t constituted an incomplete verdict in that it would not support a judgment" *Id.* Recognizing that an assault in North Carolina means "an overt act or attempt, or the unequivocal appearance of an attempt," *id.* (quoting *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305), this Court reasoned: "The effect of the first verdict returned by the jury was to find defendant guilty of an 'attempt to attempt.' [O]ne cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt." *Id.* (alteration original) (quoting *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912)).

If, in *Currence*, we found it impermissible for a jury on its own initiative to render a verdict of guilty of attempted assault with a deadly weapon, we cannot then uphold a guilty verdict, based on the trial judge's instructions, of attempted assault with a deadly weapon on a government officer. We are bound by *Currence*. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). Accordingly, we hold that the trial court's decision to instruct on the offense of attempted assault with a deadly weapon on a government officer was in error.

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We further hold that these instructions resulted in plain error. To establish plain error, a defendant must demonstrate “(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.” *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). In our view, instructing a jury in such a way that the jury convicts the defendant of a nonexistent offense is an unmistakable example of a miscarriage of justice. See *State v. Parker*, 143 N.C. App. 680, 683-84, 550 S.E.2d 174, 176 (2001) (holding that “defendant’s conviction . . . must be vacated” where defendant argued that trial court committed plain error in instructing jury on nonexistent crime of attempted second degree murder); *People v. Martinez*, 81 N.Y.2d 810, 812, 611 N.E.2d 277, 277, 595 N.Y.S.2d 376, 376 (1993) (in case where trial judge instructed jury on nonexistent crime of attempted first degree manslaughter, and jury found defendant guilty of that crime, holding that “such a conviction presents error fundamental to the organization of the court or the mode of proceedings proscribed by law” and therefore “must be reversed” (internal quotation marks omitted)). We therefore vacate defendant’s convictions for attempted assault with a deadly weapon on a government officer.

The parties have not specifically discussed, in their briefs, the consequences of a decision vacating the attempted assault convictions, such as whether defendant may be retried on the charge of assault with a deadly weapon on a government officer, as alleged in the indictment. We, therefore, leave that question to be addressed in the first instance by the trial court on remand.

No error in part; vacated and remanded in part.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

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STATE OF NORTH CAROLINA v. THOMAS HENRY MYERS AND
JESSE WARREN COLEMAN, DEFENDANTS

No. COA04-567-2

(Filed 2 January 2007)

Homicide— second-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err in a second-degree murder case by granting defendants' motions to dismiss, because: (1) while the State's evidence raises a strong suspicion of defendants' guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim; (2) the evidence established at most that defendants had the opportunity to commit the crime; (3) none of the State's witnesses identified the victim as the man involved in the struggle with defendants, or as the man a witness saw in the road near the pertinent residence; and (4) there was testimony indicating there were other unidentified males in the area around the same time the murder allegedly occurred.

On remand by order of the Supreme Court of North Carolina filed 17 November 2006 to reconsider the unanimous decision of the Court of Appeals, *State v. Myers and Coleman*, 174 N.C. App. 526, 621 S.E.2d 329 (2005) for reconsideration on the issue of sufficiency of the evidence in light of *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Appeal by the State from Order entered 20 November 2003 by Judge Robert F. Floyd, Jr., in Cumberland County Superior Court. Originally heard in the Court of Appeals 1 February 2005.

Attorney General Roy Cooper, by Assistant Attorney General William B. Crumpler, for the State.

Daniel Shatz, for defendant-appellee Myers.

Brian Michael Aus, for defendant-appellee Coleman.

HUDSON, Judge.

Defendants were tried for second-degree murder on 10 November 2003. At the close of the State's evidence and again at the close of all the evidence, defendants moved to dismiss, which motions the court denied. On 20 November 2003, the jury returned a verdict of guilty against both defendants. Before entry of judgment, defendants again

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moved to dismiss and the court granted their motion. The State appealed to this Court, and in an opinion issued 15 November 2005, we affirmed the trial court's dismissal. *State v. Myers and Coleman*, 174 N.C. App. 526, 621 S.E.2d 329 (2005). The State appealed to the North Carolina Supreme Court, and on 17 November 2006, that Court remanded the case to us for reconsideration in light of *State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). We affirm the trial court's dismissal.

Defendants were tried for the murder of Tommy Lee Barrow. The State introduced evidence that Mary Ann Essell was delivering newspapers around 3:00 a.m. on 10 July 2001 when she noticed a black male lying in the middle of Hopedale Road near the residence of May and Damon Herring. The man was propped up on one elbow and held up his hand. Ms. Essell thought the man was drunk and homeless. The man was wearing long dark pants, a dark shirt, and an Army jacket. She did not see any blood. After looking around for police assistance, Ms. Essell left the scene to get help. She returned to the area fifteen to twenty minutes later, accompanied by her son, to look for the man, but he was gone. Ms. Essell and her son looked in the Herrings' yard and the surrounding area, but could not find him. Ms. Essell never identified Barrow as the man she saw in the road. She also testified that she saw an unidentified man in a white t-shirt riding a bicycle in the area.

Evidence also showed that during the early morning of 10 July 2001, the Herrings heard a noise outside of their home that sounded like someone or something had hit their aluminum carport. Mr. Herring turned on the outside light and saw nothing. Around 6:00 a.m., he went out to get the newspaper and noticed nothing unusual. However, later in the morning when he went outside to do yard work, he saw a black male, later identified as Tommy Lee Barrow, lying on the ground near his carport. The man had on muddy socks, boxer shorts, and a white t-shirt covered in blood on the back. His sneakers and jean shorts were on the ground nearby, as was a wallet, some scattered change, keys, a crack pipe, and a bag. No jacket was found at the scene. Mrs. Herring called the police. A deputy from the Cumberland County Sheriff's Department arrived and found no vital signs.

An autopsy of Barrow's body revealed a stab wound in the right back, from a blow which struck his right lung and damaged the liver. Barrow died as a result of both internal and external bleeding. The stab wound would not have caused instantaneous death; Barrow

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could have moved some distance for an unspecified period of time after being stabbed. North Carolina's Chief Medical Examiner, Dr. John Butts, opined that the injury was caused by a knife or knife-like object. The autopsy also revealed a cut on the left side of Barrow's face, as well as some blunt force injuries with scraped skin adjacent to the nose.

The State's primary witness, Lisa Beeler, testified that on the afternoon of 9 July 2001, and the night of 10 July 2001, she was at the Lady Slipper trailer park, where she bought crack from defendant Coleman and got high with defendant Myers. She testified that Myers cut the crack into smaller pieces with a big knife that had brass knuckles. According to Beeler, Barrow visited the trailer where Beeler was using crack several times that evening and left about 1:00 a.m. after speaking with defendant Coleman. She testified that she left the trailer park with both defendants around 3:00 or 4:00 a.m. to get more drugs. She stated that defendant Coleman told her that they were going to meet a man nearby and pick up more crack and that in the vicinity of Hopedale Road, Coleman told Myers, "There he is. There he is. Go over there and get the stuff, go talk to him." Ms. Beeler testified that she looked and saw a black man walking up the street, but she did not identify this man as Barrow, as she said she could not see him well enough to tell who it was. She and Coleman waited by a bush near the corner where the Herrings live. Beeler testified that she heard loud arguing coming from the direction where Myers and the other man were located and that Coleman turned her around and told her not to look that way, saying "You don't want to see this." According to Beeler, while they were still waiting, a light came on in the Herrings' house and Coleman said he was going to go see what was taking so long. Beeler testified that after a minute or so, she heard a loud groan coming from a struggle and then silence. She began to leave when defendants ran up to her about five minutes later. When she asked what was going on, Coleman told her to shut up and be patient.

Beeler testified that when she and defendants reached an intersection with a street light, Beeler saw that Myers had dirt and what appeared to be blood on him. Coleman told Myers he better remove the bloody clothes, to go home and shower. According to Beeler, Myers told Coleman, "I got him good, didn't I cuz?", to which Coleman responded that Myers should shut his mouth and be quiet, that he needed to think. Beeler stated that as they walked, Myers was going through something that appeared to be like a wallet and that one of

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the defendants commented that there was no money in the wallet. When Beeler again asked what was going on, she said that Coleman told her, “Don’t you want to get high? Just keep your mouth shut, or you’re in like Tommy.” However, Beeler testified that she believed that Coleman was referring to Tommy Myers and how dirty he was from the struggle. Coleman and Beeler returned to a friend’s trailer, and when Myers got there about twenty minutes later, he had showered and changed into clean clothes. Beeler had made prior inconsistent statements to the police, but when questioned about this at trial, she stated that after she learned of the victim’s death and realized what had happened, that she came forward.

Our review of a trial court’s ruling on a motion to dismiss is the same regardless of whether the motion is made at the close of the State’s evidence, at the close of all the evidence, after return of a verdict of guilty and before entry of judgment, or after discharge of the jury without a verdict and before the end of the session. *State v. Scott*, 356 N.C. 591, 595-96, 573 S.E.2d 866, 868 (2002). In reviewing the trial court’s ruling, we must evaluate the evidence in the light most favorable to the State. *State v. Molloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983). All contradictions must be resolved in favor of the State. *Id.* The ultimate question is “whether a reasonable inference of the defendant’s guilt may be drawn from the circumstances.” *State v. Lee*, 348 N.C. 474, 488, 501 S.E.2d 334, 343 (1998). As long as the evidence supports a reasonable inference of defendant’s guilt, it is up to the jury to decide whether there is proof beyond a reasonable doubt. *State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998). This is true regardless of whether the evidence is direct or circumstantial. *Id.* However, if the evidence is “sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *Molloy*, 309 N.C. at 179, 305 S.E.2d at 720 (internal citation omitted). “This is true even though the suspicion aroused by the evidence is strong.” *Id.* (internal citation omitted).

As noted by other courts faced with this issue, the rules regarding a determination of sufficiency of the evidence are easier to state than to apply and require a case-by-case analysis. See, e.g., *State v. Bell*, 65 N.C. App. 234, 236, 309 S.E.2d 464, 466 (1983), aff’d, 311 N.C. 299, S.E.2d 72 (1984); *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967). In our opinion issued on 15 November 2005, affirming the trial court’s dismissal of this case, we cited several cases for the proposition that a conviction cannot be sustained if it impermissibly stacks

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inferences. 174 N.C. App. at 530-31, 621 S.E.2d at 332-33 (citing *Bell*, 65 N.C. App. at 236, 309 S.E.2d at 466; *State v. Chapman*, 293 N.C. 585, 586, 238 S.E.2d 784, 785 (1977); *State v. Davis*, 74 N.C. App. 208, 213, 328 S.E.2d 11, 15, *disc. review denied*, 313 N.C. 510, 329 S.E.2d 406 (1985)). However, our Supreme Court has directed our attention to *State v. Childress*, which held that a jury could properly base “inferences on inferences,” and that “[i]nsofar as *Holland*, *Byrd*, *LeDuc* and other cases hold that in considering circumstantial evidence an inference may not be made from an inference, they are overruled.” *Id.*, 321 N.C. at 233, 362 S.E.2d at 267. Without addressing whether *Chapman*, *Davis*, and *Bell*, were overruled by *Childress* or are distinguishable, we conclude, as we did before, that while the State’s evidence raises a strong suspicion of defendants’ guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim.

Although our analysis of sufficiency of the evidence must be based on the “evidence introduced in each case, as a whole, and adjudications in prior cases are rarely controlling as the evidence differs from case to case,” *Cutler*, 271 N.C. at 383, 156 S.E.2d at 682, our conclusion is guided, in part, by instructive cases. In *State v. Cutler*, the State offered evidence that on the same day as the murder, a truck similar to defendant’s was seen at the victim’s house and defendant was seen drunk and “bloody as a hog” with a large gash on his head about 500 yards from the victim’s house. 271 N.C. at 381, 156 S.E.2d at 681. Defendant was also found in possession of a knife with both human blood and a hair “similar” to the chest hair of the victim on it. *Id.* at 384, 156 S.E.2d at 682. Nevertheless, the Court held that the evidence was insufficient, noting that the State’s evidence did not show any blood from the deceased on “the person, clothing, knife or vehicle” of the defendant and that the testimony regarding the chest hair was inconclusive. *Id.* at 384, 156 S.E.2d at 682.

[The evidence was] sufficient to raise a strong suspicion of the defendant’s guilt but not sufficient to remove that issue from the realm of suspicion and conjecture. It may reasonably be inferred that the defendant was at the home of the deceased when the deceased came to his death, or shortly thereafter. However, it is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged.

Id.

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Similarly, in *State v. White*, the Court held that there was insufficient evidence to support that defendant was the perpetrator of second-degree murder. 293 N.C. 91, 235 S.E.2d 55 (1977). In *White*, the victim lived in a mobile home adjacent to the motel where defendant lived, defendant frequently visited the victim, defendant was a black male and a black male was seen running away from the mobile home on the evening of the killing, there was blood on the carpet of defendant's motel room, and a knife similar to the murder weapon was found in defendant's room. In holding that the trial judge should have allowed defendant's motion for non-suit, the Court stated that:

[t]he State has shown that the defendant was in the general vicinity of the deceased's home at the time of the murder and that he made several arguably contradictory statements during the course of the police investigation. It may even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter. Thus, the State has established that the defendant had an opportunity to commit the crime charged. Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do.

Id. at 96, 235 S.E.2d at 59 (internal citations and quotation marks omitted).

We conclude that as in *Cutler* and *White*, the evidence here establishes at most that defendants had the opportunity to commit the crime. Taking the testimony in the light most favorable to the State, the evidence tends to establish that: defendants were in the vicinity of the Herring residence sometime in the early morning of 10 July 2001, that Barrow's body was found in this vicinity several hours later, that defendants argued and struggled with an unidentified individual who groaned at one point during the struggle, and that defendant Myers appeared to have blood and dirt on his shirt after the struggle. We note that none of the State's witnesses identified Barrow as the man involved in the struggle with defendants, or as the man Mary Ann Essell saw in the road near the Herring residence. Furthermore, there was testimony indicating that there were other unidentified males in the area around the same time the murder is alleged to have occurred. Although the evidence here arouses strong suspicion, we conclude that it is "sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator," and thus the trial court correctly granted defendants' motions to dismiss. *Molloy*, 309 N.C. at 179, 305 S.E.2d at 720.

STATE v. LOCKHART

[181 N.C. App. 316 (2007)]

Affirmed.

Judges WYNN and STEELMAN concur.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

STATE OF NORTH CAROLINA v. HENRY SCOTT LOCKHART, DEFENDANT

No. COA06-174

(Filed 2 January 2007)

1. Appeal and Error— appellate rules violations—sanctions

Defense counsel is personally required to pay the printing costs of this appeal in a work-release escape case as a sanction for various appellate rules violations including: (1) the argument section is entirely single-spaced in violation of N.C. R. App. P. 26(g)(1); and (2) defense counsel failed to include a statement of the standard of review with respect to his argument challenging the trial court's denial of his motion to dismiss as required by N.C. R. App. P. 28(b)(6).

2. Escape— indictment—work-release prisoner—improper statutory citation

The trial court did not err by concluding there was no fatal variance between the indictment and the evidence presented at trial even though defendant contends the indictment charged him with felony escape under N.C.G.S. § 148-45(b)(1) rather than escape of a work-release prisoner under N.C.G.S. § 148-45(g)(1), because: (1) the indictment tracked the language of N.C.G.S. § 148-45(g); and (2) an indictment's improper statutory citation is immaterial when the language of the indictment sufficiently apprises a defendant of the charge at issue.

3. Escape— work-release escape—motion to dismiss—sufficiency of evidence—24-hour exception

The trial court did not err by denying defendant's motion to dismiss the charge of work-release escape even though defendant contends he returned voluntarily within twenty-four hours, and his derivative assignments of error challenging his habitual felon

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indictment on the ground that his escape conviction was invalid are also dismissed, because: (1) it was defendant's burden to establish this affirmative defense to the jury; (2) although the State's evidence demonstrated that defendant was recaptured within 24 hours, it also indicated that defendant's family only surrendered him to law enforcement after officers threatened to obtain a search warrant and press criminal charges against defendant's family members for harboring a fugitive; and (3) the jury could have concluded this surrender was not a voluntary return by defendant to his place of confinement.

Appeal by defendant from judgment entered 16 August 2005 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 19 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for the State.

David Childers for defendant-appellant.

GEER, Judge.

Defendant Henry Scott Lockhart appeals from his convictions for felonious escape and having achieved the status of habitual felon. On appeal, defendant primarily argues that the indictment improperly charged him with felony escape under N.C. Gen. Stat. § 148-45(b) (2005) rather than escape of a work-release prisoner under N.C. Gen. Stat. § 148-45(g), and, therefore, that there was a fatal variance between the indictment and the evidence presented at trial. We hold that because the indictment tracked the language of N.C. Gen. Stat. § 148-45(g), it was sufficient to charge defendant with a work-release escape. Further, contrary to defendant's contention, we conclude that the State presented substantial evidence of each element of the offense and that defendant failed to establish he was entitled to dismissal based upon an affirmative defense. Accordingly, the trial court properly denied defendant's motion to dismiss.

Facts

The State's evidence at trial tended to show the following facts. In October 2002, defendant was an inmate at the Union Correctional Center in Monroe, North Carolina. Defendant participated in a work-release program, in which a prison van transported defendant between the correctional center and a work-release site. On the

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morning of 18 October 2002, defendant was transported by a prison van to his work site, Don's Auto Parts in Monroe, North Carolina. When the prison van returned at the end of the day to pick defendant up, he was not there.

The van driver contacted Union Correctional Center Sergeant Ronald Tarlton, who then left the correctional center in an effort to locate defendant. After searching for defendant at Don's Auto Parts and in the surrounding area for 40 minutes to an hour, Sergeant Tarlton activated the "escape procedures," at which time defendant's absence became "an official escape."

By 10:15 p.m., law enforcement had visited the homes of five of defendant's friends and family members. At approximately 3:30 a.m. on the morning of 19 October 2002, officers arrived at the home of defendant's sister, Joyce Price, in Wingate, North Carolina. Upon arrival, second-shift Union Correctional Center Sergeant David K. Funderburk noticed there were several vehicles in the driveway and thought he caught a glimpse of defendant in the home. Although officers informed defendant's family members that defendant was wanted for escape, the family declined to allow the officers to come into the house to look for defendant. The officers told the family that they would wait outside while a search warrant was sought, but that if one was obtained and defendant was discovered inside the residence, charges could be brought against those in the home. The family surrendered defendant to authorities several minutes later.

Defendant was subsequently indicted for escape from the state prison system and having attained the status of habitual felon. The matter was tried before a jury on 15 and 16 August 2005, and the jury returned a verdict finding defendant guilty of felonious escape. After defendant pled guilty to having attained habitual felon status, the trial court sentenced defendant within the mitigated range to 44 to 62 months imprisonment. Defendant timely appealed to this Court.

I

[1] We are first compelled to address certain violations by defense counsel of the North Carolina Rules of Appellate Procedure. Those rules "are mandatory" and failure to follow these rules will subject an appeal to sanctions, up to and including dismissal. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005). See also N.C.R. App. P. 25(b), 34.

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Under North Carolina Rule of Appellate Procedure 26(g)(1), in all briefs submitted to the appellate courts, “[t]he body of text shall be presented with double spacing between each line of text.” Although the opening sections of defendant’s brief are double-spaced, the argument section is entirely single-spaced. Further, under Rule 28(b)(6), each argument in an appellant’s brief “shall contain a concise statement of the applicable standard(s) of review for each question presented” Defense counsel, however, failed to include a statement of the standard of review with respect to his argument challenging the trial court’s denial of his motion to dismiss.

We believe that an appropriate sanction for these obvious rules violations is to require defendant’s counsel to personally pay the printing costs of this appeal. *See, e.g., State v. Riley*, 167 N.C. App. 346, 347-48, 605 S.E.2d 212, 214 (2004) (sanctioning defense counsel with appellate printing costs as a sanction for submitting single-spaced brief). We instruct the Clerk of this Court to enter an order accordingly.

II

[2] We now turn to defendant’s argument that the indictment improperly charged him with felony escape under N.C. Gen. Stat. § 148-45(b)(1) rather than escape of a work-release prisoner under N.C. Gen. Stat. § 148-45(g)(1), and, therefore, that there was a fatal variance between the indictment and the evidence presented at trial. The State acknowledges that *State v. Washington*, 54 N.C. App. 683, 685, 284 S.E.2d 330, 331 (1981), reversed an escape conviction when the indictment tracked the statutory language of N.C. Gen. Stat. § 148-45(b), but the evidence supported a conviction only under N.C. Gen. Stat. § 148-45(g). Nevertheless, the State contends (1) that N.C. Gen. Stat. § 148-45 has since been amended so as to render *Washington* inapplicable and (2) that a citation in the indictment to N.C. Gen. Stat. § 148-45(b) was necessary to give defendant notice that he was being charged as a felon. We need not, however, resolve these issues, because the indictment in this case in fact properly charged a violation of N.C. Gen. Stat. § 148-45(g).

Under N.C. Gen. Stat. § 148-45(b)(1), a prisoner in the custody of the Department of Correction, who is serving a sentence for a felony conviction and “escape[s] from the State prison system, shall, except as provided in subsection (g) of this section, be punished as a Class H felon.” N.C. Gen. Stat. § 148-45(g)(1) provides that any prisoner who is assigned to a work-release program and fails to return to cus-

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tody following a work-release shall likewise be guilty of escape. Although a work-release escapee is subject to the general escape provisions of N.C. Gen. Stat. § 148-45, a first-time work-release escapee (unlike a non-work-release escapee) may avoid criminal charges by “voluntarily return[ing] to his place of confinement within 24 hours of the time at which he was ordered to return” N.C. Gen. Stat. § 148-45(g)(2).

Here, there is no dispute that defendant was assigned to a work-release program. The indictment, however, bears only the generic heading “Escape from the State Prison System” and specifically cites only to N.C. Gen. Stat. § 148-45(b), the non-work-release statute. Nevertheless, the body of the indictment goes on to state that defendant:

unlawfully, willfully and feloniously did escape from state prison unit #4550, Union Correctional Center, Monroe, North Carolina, a unit of the state prison system, while the defendant was there in the lawful custody of the Department of Correction serving a sentence for a conviction of a felony, that sentence having been imposed at the May 16, 1996 session of the Union County Superior Court. *The defendant escaped while on work release by willfully failing to return to the prison unit at the designated time.*

(Emphasis added.) Because this indictment effectively tracks the language of N.C. Gen. Stat. § 148-45(g)(1), this case is distinguishable from *Washington*, in which the defendant was convicted under N.C. Gen. Stat. § 148-45(g) even though the indictment only “followed the language of G.S. 148-45(b).” 54 N.C. App. at 685, 284 S.E.2d at 331.

As this Court has previously held, an indictment’s improper statutory citation is immaterial when the language of the indictment sufficiently apprises a defendant of the charge at issue. *State v. Allen*, 112 N.C. App. 419, 428, 435 S.E.2d 802, 807-08 (1993) (upholding indictment when the caption referred to N.C. Gen. Stat. § 14-33(b)(4) (1986), but the wording in the body of the indictment described a violation of N.C. Gen. Stat. § 14-34.2(1) (1986), the basis for his conviction). See also *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996) (indictment charging a statutory offense is adequate when it “allege[s] all of the essential elements of the offense”). Since the indictment in this case tracked the statutory language of N.C. Gen. Stat. § 148-45(g), we hold that defendant was effectively charged with

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a work-release escape, irrespective whether the indictment's citation to N.C. Gen. Stat. § 148-45(b) was erroneous. These assignments of error are, therefore, overruled.

III

[3] Defendant next contends that, even assuming he was properly charged with a work-release escape under N.C. Gen. Stat. § 148-45(g)(1), the trial court erred by denying his motion to dismiss for insufficient evidence. In ruling on a defendant's motion to dismiss, the trial court must determine whether the State presented substantial evidence (1) of each essential element of the offense and (2) of the defendant's being the perpetrator. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). When considering whether the State has presented substantial evidence, the trial court must view all of the evidence "in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818, 115 S. Ct. 2565 (1995).

Defendant does not assert that the State failed to present evidence of each element of work-release escape, but, rather, that it "was abundantly clear . . . that [he] had returned voluntarily within twenty-four (24) hours." It was defendant, however, who had the burden of establishing this affirmative defense to the satisfaction of the jury. See *State v. Womble*, 44 N.C. App. 503, 506, 261 S.E.2d 263, 266 (noting that "the 24-hour exception provided in G.S. 148-45(g)(2) is a defense which defendant may have raised had the evidence warranted"), *appeal dismissed and disc. review denied*, 299 N.C. 740, 267 S.E.2d 669 (1980). See also *State v. Connell*, 127 N.C. App. 685, 691, 493 S.E.2d 292, 296 (1997) (defendant bears burden of showing affirmative defenses "to the satisfaction of the jury" (quoting *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975))), *disc. review denied*, 347 N.C. 579, 502 S.E.2d 602 (1998). This Court may reverse the denial of a motion to dismiss based upon an affirmative defense only if the evidence in support of that affirmative defense is undisputed and does not require determination of a witness' credibility. See *State v. Sellers*, 155 N.C. App. 51, 56, 574 S.E.2d 101, 105 (2002) (holding that trial court properly denied motion to dismiss despite undisputed testimony that defendant was insane because the credibility of that testimony was a question for the jury); *State v.*

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Branham, 153 N.C. App. 91, 100, 569 S.E.2d 24, 29 (2002) (“When the evidence of entrapment is undisputed, the trial court may find that defendant was entrapped as a matter of law.”).

Although the State’s evidence demonstrated that defendant was recaptured within 24 hours, it also indicated that defendant’s family only surrendered him to law enforcement after officers threatened to obtain a search warrant and press criminal charges against defendant’s family members for harboring a fugitive. The jury could have concluded this surrender was not a “voluntar[y] return[]” by defendant to his place of confinement. *Compare State v. Watson*, 51 N.C. App. 369, 370, 276 S.E.2d 732, 734 (1981) (defendant voluntarily returned when, after going home, he returned on his own accord and turned himself over at the location from where he escaped).

As defendant has failed to show that the undisputed evidence supported the conclusion that he voluntarily returned into custody, we cannot conclude that the trial court erred by denying defendant’s motion to dismiss the charge of work-release escape. As we have rejected defendant’s attacks on his escape conviction, we also overrule his derivative assignments of error challenging his habitual felon indictment on the grounds that his escape conviction was invalid.

No error.

Judges STEELMAN and STEPHENS concur.

Judge STEPHENS concurred prior to 31 December 2006.

IN THE MATTER OF: M.E., A MINOR CHILD

No. COA06-787

(Filed 2 January 2007)

Child Support, Custody, and Visitation—interstate custody dispute—subject matter jurisdiction

The trial court did not abuse its discretion in a child custody case by concluding in a supplemental order dated 15 May 2006 that North Carolina was an inconvenient forum and by transferring jurisdiction to Ohio, because: (1) a review of the record and

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transcript showed the trial court's findings were based upon orders entered in the case and reports from social workers and counselors; (2) contrary to respondent's assertion, the trial court properly considered the findings of fact in its 3 January 2005 custody review order in determining whether North Carolina was not a convenient forum for the case; and (3) the trial court made the appropriate findings under N.C.G.S. § 50A-207.

Appeal by respondent-mother from order entered 15 May 2006 by Judge Pell Cooper in Edgecombe County District Court. Heard in the Court of Appeals 11 December 2006.

Lawrence Best & Associates, P.A., by Natarlin R. Best, for Edgecombe County Department of Social Services petitioner-appellee; Robert Dale Pitt, for guardian ad litem; and Rountree & Boyette, LLP, by Wayne S. Boyette, for respondent-father appellee.

Duncan B. McCormick for respondent-mother appellant.

McCULLOUGH, Judge.

Respondent-mother (respondent) appeals from a supplemental order entered 15 May 2006 finding and concluding that North Carolina was an inconvenient forum and transferring jurisdiction of the matter to Ohio.

The facts of this case are as follows: The trial court adjudicated M.E. dependent on 4 May 2000 and placed legal and physical custody of M.E. with Edgecombe County Department of Social Services. By orders filed in 2002, the trial court subsequently granted physical custody and legal custody of M.E. to her father, who lives in Ohio. Respondent moved for custody review on 9 September 2004, requesting that M.E. be placed with her. After holding a hearing on respondent's motion, the trial court entered a Custody Review order on 3 January 2005 and ordered, among other things, that the father have legal and physical custody of M.E., with respondent having visitation and notification rights. The trial court also suspended all further reviews and transferred jurisdiction to Seneca County, Ohio.

Respondent appealed to this Court challenging the portion of the 3 January 2005 order pertaining to the transfer of jurisdiction. Respondent contended that the trial court erred by transferring jurisdiction to Ohio without making relevant findings of fact and conclu-

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sions of law. This Court agreed with respondent and vacated the portion of the order regarding the transfer of jurisdiction and remanded “for entry of an order containing the appropriate findings of fact and conclusions of law, or other action consistent with this decision.” *In re M.E.*, 177 N.C. App. 286 (2006) (unpublished) (hereinafter “*M.E. I*”). This Court affirmed the trial court’s 3 January 2005 order “in all other aspects[.]” *Id.*

Upon remand, the trial court entered a “Custody Review Supplemental Order” on 15 May 2006, in which it incorporated the findings and conclusions of its 3 January 2005 order, and made additional findings of fact in accordance with this Court’s opinion. Based on the findings, the trial court concluded that “a court of proper jurisdiction located in the State of Ohio is a more appropriate forum under the circumstances than this Court located in the State of North Carolina[.]” The trial court also stayed proceedings in the matter for a period of no more than three months from the date of the supplemental order to allow the father to bring a child custody action in Ohio. From this supplemental order, respondent appeals.

The dispositive issue on appeal is whether the trial court abused its discretion in finding and concluding that North Carolina was an inconvenient forum.

Subject matter jurisdiction in interstate custody disputes are generally governed by the Uniform Child Custody Jurisdiction Act, which has been codified in North Carolina under Chapter 50A of the North Carolina General Statutes. *See Wilson v. Wilson*, 121 N.C. App. 292, 294, 465 S.E.2d 44, 45 (1996); *see also* 28 U.S.C.S. § 1738A (2006). Pursuant to N.C. Gen. Stat. § 50A-207, a court “may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum.” N.C. Gen. Stat. § 50A-207(a) (2005) (emphasis added). The statute further provides:

(b) Before determining whether it is an inconvenient forum, a court of this State shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

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- (2) The length of time the child has resided outside this State;
- (3) The distance between the court in this State and the court in the state that would assume jurisdiction;
- (4) The relative financial circumstances of the parties;
- (5) Any agreement of the parties as to which state should assume jurisdiction;
- (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
- (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
- (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

N.C. Gen. Stat. § 50A-207(b)(1)-(8). "In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003).

In support of its conclusion that North Carolina was an inconvenient forum, the trial court made the following seventeen findings of fact with respect to the list of factors outlined in Section 50A-207(b):

- (1) That, M.E. has been exposed to no domestic violence in Ohio;
- (2) That, in the unlikely event that M.E. was to be exposed to domestic violence, the State of Ohio, where M.E., Ohio Social Services, and M.E.'s therapists are located, could best protect M.E.;
- (3) That, according to M.E.'s therapist, Chris Harvey, and the Court so finds as fact, M.E. has adjusted to her placement, is happy and her father is a nurturing and caring parent who has appropriate parenting skills to meet M.E.'s needs;
- (4) That, M.E. has resided in Ohio, and therefore outside of this State, with her father for nearly three years, the Edgecombe County Department of Social Services having placed M.E. in the physical custody of her father in March of 2002;

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- (5) That, the distance between this Edgecombe County court and the court in Ohio that would assume jurisdiction of this case is approximately 500 miles;
- (6) That, in the past the father, though working, was at least once unable to make the trip from Ohio to Edgecombe County, N.C., because of the financial burdens of such trip and that, in the past, the father has missed work because of a required court appearance in said County;
- (7) That, in the past, the father found it necessary to work with the mother by meeting her half way between their respective residences in North Carolina and Ohio in order to facilitate visitation for all parties concerned;
- (8) That, because of said approximate 500 mile distance between said courts, the financial burden on both the father and the mother would be significant;
- (9) That, the parties did not reach an agreement as to whether Ohio or North Carolina would assume jurisdiction;
- (10) That, since said physical placement of M.E. with her father, M.E., her father and stepmother have received counseling in Ohio with Chris Harvey, a therapist with Firelands Counseling and Recovery Services, and M.E. continues to receive needed counseling in the State of Ohio;
- (11) That, M.E.'s current therapists and most, if not all, of M.E.'s psychological and therapeutic records accumulated over the past three years are located in Ohio;
- (12) That, the Ohio DSS is familiar with M.E. and this family, having investigated the family on more than one occasion due to the mother's referrals which were subsequently unsubstantiated;
- (13) That, the nature of the evidence in this case required to resolve the pending litigation is largely comprised of records and testimony, the vast majority of which are located in Ohio, to wit: the testimony of Ohio DSS officials, the testimony of M.E., the testimony of M.E.'s father, stepmother, therapists, teachers, and principal, AND the recent school, therapeutic and psychological records of M.E.;
- (14) That, due to the location of the evidence, the Ohio Court has the ability to decide any issue pertaining to this case expeditiously;

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(15) That, the procedures necessary to present the evidence, i.e., procuring testimonial evidence located in Ohio and producing recent therapeutic and school records also located in Ohio, can be accomplished most effectively and efficiently by the Ohio court;

(16) That, due also to the fact that the evidence presented in all of the hearings throughout the history of this case is preserved in comprehensive, comprehensible form in the court records, the Ohio Court would be well equipped to understand quickly and to decide expeditiously any issue pertaining to this case;

(17) That, the North Carolina Judges who have presided over any hearing in this case are, in general, more familiar with the straightforward facts and issues of this case than any Judge, whether located in Ohio or North Carolina, who has heard no portion of this case, though any Judge, upon review of the well documented, comprehensible court file, would immediately become familiar with said facts and issues[.]

In her brief, respondent challenges findings of fact 13 through 17; thus, the remaining findings are presumed to be correct and supported by the evidence. *See In re Moore*, 306 N.C. 394, 293 S.E.2d 127, *reh'g denied*, 306 N.C. 565 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983). A review of the record and transcript shows each of the trial court's findings are based upon orders entered in the case and reports from social workers and counselors. Further, contrary to respondent's assertion, the trial court properly considered the findings of fact in its 3 January 2005 Custody Review order in determining whether North Carolina was not a convenient forum for the case. As this Court noted in *M.E. I*, respondent did not challenge "any portion of the trial court's order, other than its transfer of jurisdiction to Ohio" and this Court affirmed the Custody Review order "in all respects other than the transfer of jurisdiction." *M.E.*, No. 05-1129, slip op. at 6.

We are also unpersuaded by respondent's assertion that the trial court erred in transferring jurisdiction to Ohio because there was no pending litigation since the trial court had already ruled on the merits of her motion for review. Here, the 1999 juvenile petition alleging M.E. dependent vested the trial court with continuing subject matter jurisdiction until M.E.'s eighteenth birthday. *See In the Matter of Arends*, 88 N.C. App. 550, 364 S.E.2d 169 (1988) (holding that the trial court retained exclusive jurisdiction over the children pursuant to

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N.C. Gen. Stat. § 7B-201, which provided that the trial court had continuing jurisdiction over any case involving a delinquent, undisciplined, abused, neglected, or dependent juvenile until the juvenile's eighteenth birthday or emancipation). Thus, the matter is "pending" within the meaning of § 50A-207 and under this statute, the court "may decline to exercise its jurisdiction **at any time** if it determines that it is an inconvenient forum." N.C. Gen. Stat. § 50A-207(a) (emphasis added).

We conclude that there is sufficient evidence for the trial court to transfer jurisdiction to Ohio and the trial court made the appropriate findings under N.C. Gen. Stat. § 50A-207. Accordingly, the trial court properly entered its supplemental order. The trial court's order is

Affirmed.

Chief Judge MARTIN and Judge LEVINSON concur.

STATE OF NORTH CAROLINA v. ANTHONY RHEIM HOLT

No. COA05-1613

(Filed 2 January 2007)

1. Appeal and Error— preservation of issues—failure to argue

Two assignments of error that defendant did not argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

2. Burglary and Unlawful Breaking or Entering— first-degree burglary—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree burglary at the close of all evidence, because: (1) our Supreme Court has held that it is entirely appropriate to convict a defendant of burglary even if he is acquitted of the underlying felony, which was attempted rape in this case, since the issue is defendant's intent at the time of breaking and entering instead of his subsequent success following through on his plans; (2) there was substantial evidence from which the jury could have plausibly determined that defendant entered with the intent of committing rape, but did not follow through with his

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plans; and (3) the Court of Appeals declined to exercise its discretionary authority under N.C. R. App. P. 2 to review defendant's unassigned error alleging the trial court erred by instructing the jury on the effect defendant's intoxication could have upon his ability to form a specific intent to commit a felony at the time of his breaking and entry into the victim's dwelling.

3. Criminal Law— motion for appropriate relief—abuse of discretion standard

The trial court did not abuse its discretion in a first-degree burglary case by denying defendant's post-trial motion for appropriate relief based on alleged insufficiency of the evidence because the evidence was sufficient to warrant submission of the case to the jury.

Appeal by defendant from judgment entered 6 June 2005 by Judge Ronald Stephens in Alamance County Superior Court. Heard in the Court of Appeals 11 December 2006.

*Roy Cooper, Attorney General, by Dahr Joseph Tanoury,
Assistant Attorney General, for the State.*

Robert T. Newman for the defendant-appellant.

MARTIN, Chief Judge.

Defendant, Anthony Rheim Holt, was charged with first degree burglary and attempted first degree rape. At the close of the State's evidence, the trial court dismissed the charge of attempted first degree rape, and the trial proceeded upon the issue of defendant's guilt or innocence of first degree burglary and attempted second degree rape. Defendant's motion to dismiss at the close of all the evidence was denied, and the jury found defendant guilty of first degree burglary but acquitted him of attempted second degree rape. He appeals from a judgment imposing an active sentence of imprisonment.

The evidence at trial tended to show that defendant attended a cookout at the residence of his girlfriend, Tanya Hudson, on the night of 11 September 2004. Defendant had stayed at Ms. Hudson's house the night before, and they had sexual relations at that time. The defendant and Ms. Hudson apparently planned for him to sleep over the night of the cookout as well, and there was some evidence suggesting that defendant and Ms. Hudson were living together. During

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the evening, both defendant and Ms. Hudson consumed alcohol along with the cookout guests.

Defendant and Ms. Hudson got into an argument, apparently stemming from the defendant's mistaken belief that Ms. Hudson intended to drive a woman named Kelly, who was intoxicated, to her home and leave him behind. Defendant pushed Ms. Hudson with sufficient force for her to come out of her sandals. He then cursed and tried to flip the coffee table onto Kelly. During the altercation, Ms. Hudson called 911. Ms. Hudson explained to defendant that she had not intended to leave him and succeeded in calming him. Kelly went home and Ms. Hudson told defendant she had called the police and asked him to leave so that he would not get in trouble. Defendant apologized and went out of the house, after which Ms. Hudson secured the door and deadbolt. Defendant remained outside, asking to be let back in, but Ms. Hudson refused.

About midnight, as Ms. Hudson sat in her living room, defendant suddenly kicked in the back door. Ms. Hudson dialed 911 and placed the phone where she hoped defendant would not see it. Defendant choked Ms. Hudson and started ripping her clothes off. When defendant saw that she could not catch her breath, he released Ms. Hudson.

Ms. Hudson subsequently retreated to her bedroom and locked the door. She had begun to put her clothes on when defendant kicked in the bedroom door. He explained that he wanted to make sure that Ms. Hudson was all right, and Ms. Hudson told him to leave her alone. She left the house to call the police. At the time of her departure from the residence, defendant was fully clothed.

Officers from the Burlington Police Department responded to Ms. Hudson's call. Corporal J.R. Marshal, the first officer on the scene, observed Ms. Tucker standing next to the road with her cell phone. The officer testified at trial that she was "very upset, hysterical, crying. She stated that her ex-boyfriend had broken into her residence, held her down and tore her clothes off, and which she had believed to be attempting him having sex with her." The officer requested the support of additional units, and four other officers arrived at the scene. They tried the door to the Hudson residence and found it locked. Corporal Summers knocked, and defendant opened the door. He was not wearing any clothes. The officers took defendant into custody, assisted him with his clothing and escorted him to a police car.

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[1] Defendant brings forward arguments in support of two of the four assignments of error contained in the record on appeal. His remaining assignments of error will, therefore, not be reviewed. *See N.C.R. App. P. 28(b)(6)* (“Assignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

[2] Defendant first assigns error to the trial court’s denial of his motion to dismiss the charges at the end of the State’s evidence and at the close of all the evidence. Because defendant offered evidence following the denial of his motion to dismiss at the close of the State’s evidence, only the denial of the motion made at the close of all the evidence is properly before us. *See State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985).

In reviewing a motion to dismiss on the grounds of sufficiency of the evidence, the issue is “whether substantial evidence exists as to each essential element of the offense charged and of the defendant being the perpetrator of that offense.” *State v. Glover*, 156 N.C. App. 139, 142, 575 S.E.2d 835, 837 (2003). “Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). A motion to dismiss should be denied if there is substantial evidence, whether direct, circumstantial, or both, that the defendant committed the offense charged. *State v. Thaggard*, 168 N.C. App. 263, 281, 608 S.E.2d 774, 786 (2005). “The trial court must consider the evidence ‘in the light most favorable to the State,’ and the State is entitled to every reasonable inference to be drawn from it.” *State v. Quinn*, 166 N.C. App. 733, 739, 603 S.E.2d 886, 889 (2004) (quoting *State v. Bright*, 301 N.C. 243, 257, 271 S.E.2d 368, 377 (1980)).

The elements of the offense of first degree burglary are: “(1) [t]he breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.” *State v. Rich*, 130 N.C. App. 113, 118, 502 S.E.2d 49, 53 (1998) (quoting *State v. Wells*, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976)).

Defendant premises his argument on the sixth element, that of intent to commit a felony. In support of his argument, defendant notes his acquittal of attempted second degree rape and argues:

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Apparently the jury in this case felt that none of the Defendant's acts were an attempt of rape. Excluding Defendant's actions after he entered Ms. Hudson's house, there is absolutely no evidence of Defendant's intent at the time he entered the house. . . . Prosecuting witnesses's own evidence was contradictory in many instances. . . .

However, contradictions or discrepancies in the evidence are for the jury to resolve and should not warrant a dismissal. *State v. Griffin*, 136 N.C. App. 531, 544, 525 S.E.2d 793, 803 (2000). Moreover, our Supreme Court has held that it is entirely appropriate to convict a defendant of burglary, even if he is acquitted of the underlying felony, in this case rape. *State v. Freeman*, 307 N.C. 445, 451, 298 S.E.2d 376, 380 (1983). This is because the pivotal issue in a burglary prosecution is the defendant's intent *at the time of breaking and entering*, not his subsequent success in following through on his plans. *Id.* (emphasis added). In this case, there was substantial evidence from which the jury could have plausibly determined that defendant entered with the intent of committing rape, but did not follow through with his plans.

Defendant also attempts, within this first assignment of error, to argue that the trial court erred in instructing the jury on the effect defendant's intoxication could have upon his ability to form a specific intent to commit a felony at the time of his breaking and entry into Ms. Hudson's dwelling. While acknowledging that he neither requested the instruction at trial nor assigned plain error to the trial court's failure to give it, defendant invokes N.C.R. App. P. 2 to urge us to review the unassigned error. We decline his invitation as we believe it would be an improper use of the discretion accorded us by Rule 2 if we were to undertake to review matters which were neither brought to the attention of the trial court nor assigned as error on appeal. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Defendant's first assignment of error is overruled.

[3] In his second assignment of error, defendant argues that the trial court erred in denying his post-trial motion for appropriate relief, made on the grounds of the insufficiency of the evidence and that the verdict was contrary to the weight of the evidence. A trial court's ruling on a motion for appropriate relief will not be overturned absent a showing of abuse of discretion. *State v. Haywood*, 144 N.C. App. 223, 236, 550 S.E.2d 38, 46, *disc. review denied*, 354 N.C. 72, 553 S.E.2d

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206 (2001). Inasmuch as we have concluded the evidence was sufficient to warrant submission of the case to the jury, whose task it is to weigh the evidence and evaluate the testimony of the witnesses, we discern no abuse of the trial court's discretion in denying the motion for appropriate relief.

No error.

Judges MCCULLOUGH and LEVINSON concur.

JULINE BROWN, PLAINTIFF v. MONTEZ BROWN, DEFENDANT

No. COA06-491

(Filed 2 January 2007)

1. Contempt— civil—motion for reimbursement

The trial court erred in part in a civil contempt case based on child support arrearages by denying defendant's motion for reimbursement of sums paid to purge himself of contempt of court, and on remand the trial court may in its discretion receive additional evidence from the parties prior to entering an order in this matter, because: (1) with respect to the portion of the trial court's order dismissing defendant's claim for reimbursement of lost wages and other costs, dismissal was warranted since defendant did not present evidence at the hearing involving his lost wages or other costs, and defendant did not assign error or present any argument concerning this finding; (2) the prior orders of contempt were vacated, a vacated order is null and void with no legal force or effect on the parties or the matter in question, and thus, the orders setting forth the sums of money due to plaintiff under the 1996 judgment are void and of no legal effect; and (3) the order setting off the sums owed by defendant to plaintiff under the 1996 judgment with the sums paid by plaintiff to defendant by virtue of the vacated contempt orders was devoid of any findings of fact or conclusions of law pertaining to how these sums were offset, and the mere fact that mutual judgments exist generally does not entitle a party to have one set off against the other as a matter of right. Upon remand the trial court shall apply the proper test and consider the pertinent equitable factors regarding whether a set off is appropriate in light of plaintiff's misuse of

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the court's contempt power to coerce payment of monies from defendant and any deceptive or fraudulent conduct of defendant in attempting to avoid paying child support.

2. Costs— attorney fees—improperly granted

The trial court erred in a civil contempt case based on child support arrearages by concluding that defendant was not entitled to recover attorney fees paid to purge himself of contempt, and this portion of the order is reversed and remanded for entry of an order directing the \$1,200 attorney fees to be paid into the office of the Clerk of Superior Court by the person or party who received it for disbursement to defendant, because it would be unconscionable to require defendant to pay for the services of plaintiff's attorney who improperly instituted contempt proceedings resulting in defendant's incarceration.

3. Appeal and Error— appealability—mootness

Although defendant contends the trial court erred by hearing this civil contempt case based on child support arrearages while a federal bankruptcy stay was in effect, this issue is moot and need not be addressed because defendant was discharged from bankruptcy on 28 December 2005 which was twenty days prior to the entry of the pertinent order.

Appeal by defendant from order entered 20 January 2006 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 19 October 2006.

Frank Cherry, for plaintiff-appellee.

Montez D. Brown, pro se defendant-appellant.

STEELMAN, Judge.

Defendant appeals from an order denying his motion seeking repayment of sums paid to plaintiff pursuant to previous contempt orders, which were improperly entered. For the reasons set forth herein, we affirm in part and reverse in part the order of the trial court and remand for further proceedings.

This is the second time this matter has come before this Court. See *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005); *Brown v. Brown*, 171 N.C. App. 365, 615 S.E.2d 435 (2005) (decision without published opinion).

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On 26 January 1996, the Circuit Court of Prince George's County, Maryland, entered a judgment against defendant in favor of plaintiff in the sum of \$13,178.48 for child support arrearages. On 21 August 1996, the District Court of New Hanover County, North Carolina, entered a judgment against defendant in the amount of \$13,178.48, together with \$2,500 attorney's fees, interest, and court costs based on the Maryland judgment. On 21 June 2004, plaintiff filed a motion seeking to have defendant held in contempt for failing to pay the 21 August 1996 judgment. On 14 July 2004, Judge Smith found defendant to be in contempt of court and ordered him to be arrested and held in the New Hanover County jail until he purged himself of contempt by paying the sum of \$12,388.48, together with \$1,200 attorney's fees, which were incurred by plaintiff from 3 November 2003 through 14 July 2004.

Defendant paid the sum of \$12,388.48 and was released from custody. On 8 September 2004, a second Order for Arrest was entered against the defendant. This order found that defendant had been erroneously released from custody because he failed to pay the \$1,200 attorney's fees. Defendant was ordered re-incarcerated until the attorney's fees were paid, and he was further ordered to pay \$7,900 in interest on the judgment within thirty days. Defendant paid the \$1,200 attorney's fees and was released from custody.

In *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005), this Court held that defendant was improperly held in contempt and incarcerated because the 1996 judgment was for a liquidated sum of child support arrearages and did not order periodic child support payments. The orders of 14 July 2004 and 8 September 2004 were vacated.

On 21 July 2005, defendant filed a motion seeking repayment of the sums paid to purge himself of contempt, as well as reimbursement for wages lost as a result of his incarceration. This motion was heard by Judge Corpening on 28 November 2005, and an order was entered on 18 January 2006. The order found that defendant presented no evidence to support his claim for lost wages, and the claim was denied. As to the claim for reimbursement of monies paid pursuant to the two prior contempt orders, the trial court denied defendant's motion, finding that these "were sums lawfully owing to the Plaintiff" pursuant to the judgment entered in August 1996. From this order, defendant appeals.

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[181 N.C. App. 333 (2007)]

I: Set Off in Equity

[1] In his first argument, defendant contends that the trial court erred in denying his motion for reimbursement of sums paid to purge himself of contempt of court. We disagree in part, agree in part and remand for further findings of fact.

With respect to the portion of the trial court's order dismissing defendant's claim for reimbursement of lost wages and other costs, the trial court found: “[d]efendant did not present evidence at the hearing involving his lost wages or other costs.” On appeal, defendant does not assign as error or present any argument concerning this finding of fact. As such, the trial court's finding is binding upon this court. *See, e.g., Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). This finding supports the dismissal of defendant's claim for lost wages or other costs, which must be affirmed.

This court, in *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005), stated that the prior orders of contempt were vacated. A vacated order is null and void, and has no legal force or effect on the parties or the matter in question. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393, 545 S.E.2d 788, 793, *aff'd by* 354 N.C. 564, 556 S.E.2d 294 (2001). The prior decisions of this Court are the law of this case and are binding upon this panel. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Thus, Judge Smith's orders setting forth the sums of money due to the plaintiff under the 1996 judgment are void and of no legal effect. Judge Corpening's order found that: “All sums paid by the Defendant as part of the two orders considered by the Court of Appeals were sums lawfully owed by the Defendant to the Plaintiff pursuant to the judgment entered in 1996.” Judge Corpening's order set off the sums owed by defendant to plaintiff under the 1996 judgment with the sums paid by plaintiff to defendant by virtue of the vacated contempt orders. However, this order is devoid of any findings of fact or conclusions of law pertaining to how Judge Corpening arrived at his decision that these sums offset. “[T]he mere fact that mutual judgments exist generally does not entitle a party to have one set off against the other as a matter of right.” *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 540, 551 S.E.2d 546, 557 (2001) (citing 47 Am. Jur. 2nd *Judgments* § 1031 (1995)). The *Lake Mary* decision then elaborates as to set offs, quoting a South Carolina opinion, *Welch v. Epstein*, 342 S.C. 279, 313, 536 S.E.2d 408, 425-26 (2000):

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The trial court's jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties. A set-off is not necessarily founded upon any statute or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court. Therefore, such motions are addressed to the discretion of the court—a discretion which should not be arbitrarily or capriciously exercised.

Id. (citations omitted).

After reviewing Judge Corpening's order, it appears that the set off was granted as a matter of right, not as a matter of the equitable discretion of the court. Upon remand, the trial court shall apply the proper test enunciated above, and shall consider the following equitable factors in determining whether a set off is appropriate:

- (1) The amount owed by defendant to plaintiff pursuant to the provisions of the 1996 judgments.
- (2) The amount owed by plaintiff to defendant by virtue of the void contempt orders.
- (3) The equitable principles of set off contained in the decision of *Stelling v. Trust Co.*, 213 N.C. 324, 327, 197 S.E. 754, 756 (1938).

In *Stelling*, the Court stated:

When, however, a party seeks to invoke an equitable remedy or to assert an equitable right, or to rely upon an equitable defense, his conduct must have been equitable, fair and aboveboard. It is a familiar and oft-quoted maxim of equity that "he who comes into equity must come with clean hand," or, as it is frequently expressed, "he who has not done equity, cannot have equity." A right cannot arise to anyone out of his own wrong and the misconduct need not necessarily be fraudulent.

Id.

In this regard, the trial court shall consider the fact that the plaintiff caused the contempt power of the court to be misused to coerce the payment of monies from the defendant. It shall also consider any deceptive or fraudulent conduct of the defendant in attempting to avoid paying child support.

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The trial court may, in its discretion, receive additional evidence from the parties, prior to entering an order in this matter. We remand this portion of the matter for entry of an order containing appropriate findings of fact and conclusions of law.

II: Attorney's Fees

[2] In his second argument, defendant contends that the trial court erred in concluding that he was not entitled to recover the attorney's fees paid to purge himself of contempt. We agree.

Under the terms of Judge Smith's order of 14 July 2004, defendant was ordered to pay \$1,200 attorney's fees. This sum was separate and apart from the attorney's fees allowed in the 1996 judgment. The effect of Judge Corpening's order of 18 January 2006 was to make defendant pay \$1,200 attorney's fees incurred in the contempt proceeding that resulted in defendant's being improperly arrested and incarcerated. Regardless of the ultimate resolution of the defendant's first argument, this portion of the order cannot stand. The order under which defendant paid this sum was entered without jurisdiction, was void, and has been vacated by this court. *See Brown*, 171 N.C. App. 358, 615 S.E.2d 39; *Brown*, 171 N.C. App. 365, 615 S.E.2d 435 (decision without published opinion). It would be unconscionable to require defendant to pay for the services of plaintiff's attorney who improperly instituted contempt proceedings resulting in defendant's incarceration.

This portion of Judge Corpening's order is reversed and remanded for entry of an order directing that the \$1,200 attorney's fees be paid into the office of the Clerk of Superior Court of New Hanover County by the person or party who received it, for disbursement to the defendant.

III: Bankruptcy Stay

[3] In his third argument, defendant contends that the trial court erred in hearing this matter while a federal bankruptcy stay was in effect. We disagree.

Because it appears to this Court that defendant was discharged from bankruptcy on 28 December 2005, twenty days prior to the entry of Judge Corpening's order, this issue is moot and need not be addressed by this Court.

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[181 N.C. App. 339 (2007)]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judge GEER concurs.

Judge STEPHENS concurs prior to 31 December 2006.

JOE BOWSER v. THE DURHAM HERALD COMPANY

No. COA06-421

(Filed 2 January 2007)

1. Libel and Slander— defamation—actual malice

The trial court did not err in a defamation case by granting summary judgment in favor of defendant newspaper on the issue of whether defendant published an article with actual malice, because: (1) although the phrase “attempted to pressure” was not actually in the pertinent letter, the characterization of the encounter of 23 April 2003 was a rational interpretation of the allegations contained in the letter; (2) the United States Supreme Court has refused to allow recovery for choice of language which may reflect a misconception but is a rational interpretation of the material from a defendant’s source; and (3) the pertinent statement was not bracketed by quotation marks, and thus, there was no attempt on the part of defendant to indicate that the witness actually made this statement.

2. Libel and Slander— defamation—affidavits

The trial court did not err in a defamation case by granting summary judgment in favor of defendant even though defendant presented affidavits to the trial court that allegedly raised questions concerning the credibility of the witnesses who provided affidavits to defendant, because: (1) the evidence included a witness’s letter and defendant’s article in addition to the affidavits submitted by defendant, and those items did not demonstrate actual malice on defendant’s part; and (2) the affidavits were merely additional evidence for the trial court to consider on defendant’s motion for summary judgment, but were not necessary to its decision.

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[181 N.C. App. 339 (2007)]

Appeal by plaintiff from an order granting summary judgment entered 18 January 2006 by Judge James C. Spencer in Durham County Superior Court. Heard in the Court of Appeals 12 October 2006.

Law Office of Charles M. Puttermann by Charles M. Puttermann for plaintiff-appellant.

The Bussian Law Firm, PLLC, by John A. Bussian for defendant-appellee.

STEELMAN, Judge.

Plaintiff contends that there was a genuine issue of material fact as to whether defendant published an article with actual malice, and that summary judgment was improperly granted in favor of defendant. For the reasons stated herein, we affirm.

Joe Bowser (“plaintiff”) was a member of the Durham County Board of Commissioners on 21 May 2004. The Durham Herald Company (“defendant”) published an article in The Durham Herald-Sun newspaper on 21 May 2004 titled “Letter accuses commissioner of shady acts.” This article was based upon a letter the Durham County Board of Commissioners received from Gayle Harris (“Harris”), a county employee. The letter stated that following a County Commissioners’ meeting on 23 April 2003, plaintiff waited for Harris and walked with her to her car. Plaintiff repeatedly inquired about another county employee who was a friend of his. Harris also stated that plaintiff threatened to fire her. Defendant’s article contained the following:

In the letter, Assistant Health Director Gayle Harris says Bowser attempted to pressure her to help his friend Lois Murphy, a disgruntled county employee who has alleged mistreatment by County Manager Mike Ruffin.

As a result of the article, plaintiff filed a complaint alleging defamation in Durham County Superior Court on 12 July 2004. Specifically, plaintiff alleged that the article contained a false and defamatory statement and exposed him to ridicule in his community. Defendant filed for summary judgment pursuant to N.C. R. Civ. Proc. 56 on 11 August 2004 based solely upon the fair reporting privilege. Defendant’s motion was denied on 28 February 2005. On 25 August 2005, defendant filed a second motion for summary judgment, based upon the assertion that plaintiff failed to forecast evidence that de-

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[181 N.C. App. 339 (2007)]

fendant published the article with actual malice. This motion was granted on 18 January 2006 and plaintiff's complaint was dismissed with prejudice. Plaintiff appeals.

Our standard of review on appeal from summary judgment is *de novo*, reviewing the record in the light most favorable to the non-movant. *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 26, 588 S.E.2d 20, 25 (2003). "By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a *prima facie* case at trial." *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). When a plaintiff cannot prove an essential element of his claim, it is proper to enter summary judgment for the defendant. *Broughton*, 161 N.C. App. at 26, 588 S.E.2d at 26.

In the instant case, it is uncontested that plaintiff was a public official of Durham County at the time of the publication of the article. Therefore, his defamation claim is reviewed under the standard set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964): "Where the plaintiff is a 'public official' and the allegedly defamatory statement concerns his official conduct, he must prove that the statement was 'made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Varner v. Bryan*, 113 N.C. App. 697, 703, 440 S.E.2d 295, 299 (1994) (quoting *New York Times Co.*, 376 U.S. at 279, 11 L. Ed. 2d at 706). Actual malice is proven if the defendant knew the published statement was false or acted with reckless disregard with respect to the veracity of the published statement. *Varner*, 113 N.C. App. at 703, 440 S.E.2d at 299. Minor inaccuracies are expected in media reporting due to translation, editing, and punctuation prior to publication. *Masson v. New Yorker Magazine*, 501 U.S. 496, 515, 115 L. Ed. 2d 447, 471 (1991). A published statement will only be considered false if it is so misleading that it produces a different effect on a reader's mind than would the truth. *Id.* 501 U.S. at 517, 115 L. Ed. 2d at 472.

The *New York Times* standard and its progeny are based upon our country's history of freedom of expression as evidenced by the First Amendment to the Constitution. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times*, 376 U.S. at 270, 11 L. Ed. 2d at 701. We consider the instant case in light of this precedent.

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[181 N.C. App. 339 (2007)]

[1] In his first argument, plaintiff contends that the trial court erred in granting summary judgment for defendant because a genuine issue of material fact existed as to whether the published statement was made with actual malice. We disagree.

Plaintiff's argument rests on the fact that the phrase "attempted to pressure" was not actually in Harris' letter. We do not find this argument to be persuasive. The record shows that this characterization of the encounter of 23 April 2003 was a rational interpretation of the allegations contained in the letter. Plaintiff asked Harris at least three times during their conversation about his friend. He moved closer to her while raising his voice. Finally, he made a threat against her job. We believe that defendant's choice of language that plaintiff "attempted to pressure" Harris was a fair one. Indeed, the United States Supreme Court has refused to allow recovery for choice of language which may reflect a misconception but is a rational interpretation of the material from a defendant's source. *Masson*, 501 U.S. at 519, 115 L. Ed. 2d at 474.

We further note that the statement complained of was not bracketed by quotation marks. Thus, there was no attempt on the part of defendant to indicate that Harris actually made this statement. See *Masson*, 501 U.S. at 519, 115 L. Ed. 2d at 474.

[2] In his second argument, plaintiff contends that summary judgment was improperly granted because defendant presented affidavits to the trial court that raised questions concerning the credibility of some of the witnesses who provided affidavits to defendant. We disagree.

Plaintiff cites cases where the only evidence before the trial court was a witness or an affidavit, and the credibility of the witness or affiant was at issue. See, e.g., *Locklear v. Langdon*, 129 N.C. App. 513, 517, 500 S.E.2d 748, 751 (1998); *Lee v. Shor*, 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). Neither of the cited cases was an action for defamation. The instant case is distinguishable. The evidence before the trial court included Harris' letter and defendant's article in addition to the affidavits submitted by defendant. As previously discussed, the letter and article on their face do not demonstrate actual malice on the part of defendant. The affidavits were merely additional evidence for the trial court to consider on defendant's motion for summary judgment, but were not necessary to its decision. This argument is without merit.

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[181 N.C. App. 343 (2007)]

Because we have held that the trial court properly granted summary judgment for defendant, we do not address defendant's cross-assignment of error. N.C. R. App. P. 10(d) (2006); *see also Carawan v. Tate*, 304 N.C. 696, 701, 286 S.E.2d 99, 102 (1982).

We hold that plaintiff failed to forecast evidence that defendant published the article with actual malice. Summary judgment was properly entered for defendant.

AFFIRMED.

Judge GEER concurs.

Judge STEPHENS concurs prior to 31 December 2006.

BRENTON ERIC TAYLOR, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC. d/b/a N.C. FARM BUREAU MUTUAL INSURANCE CO., DEFENDANT

No. COA06-321

(Filed 2 January 2007)

Insurance— automobile—liability—entitlement to recovery in excess of insurance policy

The trial court did not err in a breach of contract case arising out of a personal injury action by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's action against defendant insurer to recover a judgment entered against its insured in excess of the insurance policy on the grounds that the insurer in bad faith refused to settle plaintiff's original claim and failed to protect its insured from an excess verdict because: (1) a plaintiff who is not insured under an insurance policy and who cannot evidence damage caused by the insurer may not recover damages from the insurer which exceed the liability coverage for the insured; (2) plaintiff's privity with defendant and status as a third-party beneficiary to the insurance policy existed only until defendant satisfied its contractual obligations to the extent of the insurance policy provisions; and (3) plaintiff's legal grounds established that he did not seek recovery from defendant for

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alleged misconduct against him, but rather, for defendant's alleged misconduct against its own insured.

Appeal by plaintiff from judgment entered 15 December 2005 by Judge Knox Jenkins in Superior Court, Johnston County. Heard in the Court of Appeals 31 October 2006.

Jerome P. Trehy, Jr., Twiggs, Beskind, Strickland & Rabenau, P.A., Attorney for plaintiff-appellant Brenton Eric Taylor.

Walter E. Brock, Jr., Young Moore and Henderson P.A., for defendant-appellee North Carolina Farm Bureau Mutual Insurance Company, Inc.

WYNN, Judge.

Our Supreme Court has held that a plaintiff who is not insured under an insurance policy, and who cannot evidence damage caused by the insurer, may not recover from the insurer damages which exceed the liability coverage for the insured.¹ Here, Plaintiff brought a claim against the insurer to recover a judgment entered against its insured in excess of the insurance policy. Under established case law, we must uphold the trial court's dismissal of this action.

This matter arose following the trial of a personal injury action against Christie Flowers Gachuz, the insured of Defendant Farm Bureau Mutual Insurance Company. After the jury awarded Plaintiff compensatory damages of \$968,140 plus interest and costs, Farm Bureau paid \$100,000 plus interest to Plaintiff—the liability coverage limit under the insured's policy.

Unable to collect the unpaid principal and accrued interest in excess of \$1.4 million from the insured, Plaintiff sought to obtain the assistance of the insured in obtaining additional funds from Farm Bureau on grounds that it, in bad faith, refused to settle Plaintiff's original claim and failed to properly protect the insured from an excess verdict. The insured apparently refused to cooperate; so Plaintiff brought this direct action against Farm Bureau.

Rejecting Plaintiff's claims, the trial court dismissed with prejudice Plaintiff's complaint against Farm Bureau. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005).

1. *Wilson v. State Farm Auto. Ins. Co.*, 327 N.C. 419, 424, 394 S.E.2d 807, 811 (1990), *reh'g granted*, 327 N.C. 644, 399 S.E.2d 133 (1990), *withdrawn in part, aff'd in part*, 329 N.C. 262, 404 S.E.2d 852 (1991).

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On appeal, Plaintiff contends that dismissal of his complaint under Rule 12(b)(6) was improper “because the complaint stated a valid cause of action for breach of contract.” However, Plaintiff’s privity with Farm Bureau and status as a third-party beneficiary to the insurance policy existed only until Defendant satisfied its contractual obligations to the extent of the insurance policy provisions. Upon paying out the limits of the policy, Farm Bureau fulfilled its contractual obligations and thus, Plaintiff ceased to have privity with Farm Bureau. Accordingly, Plaintiff cannot maintain a breach of contract action against Farm Bureau under the facts of this matter. *See Wilson v. State Farm Auto. Ins. Co.*, 327 N.C. 419, 424, 394 S.E.2d 807, 811 (1990), *reh’g granted*, 327 N.C. 644, 399 S.E.2d 133 (1990), *withdrawn in part, aff’d in part*, 329 N.C. 262, 404 S.E.2d 852 (1991); *Wilson v. Wilson*, 121 N.C. App. 662, 667, 468 S.E.2d 495, 498 (1996).

Notwithstanding the dispositive holdings of *Wilson v. State Farm Auto* and *Wilson v. Wilson*, Plaintiff argues:

This case cries out for justice. We have a young judgment-debtor with a wholly unnecessary and perfectly avoidable judgment against her, a brain-damaged, permanently disabled and emotionally tortured judgment-creditor who was wrongfully forced to try his claims, and an elderly mother who has to work to support her grown son. Normally, a judgment-debtor faced with a massive excess judgment would cooperate with a judgment-creditor in such pathetic circumstances. What happens if she does not cooperate? What happens if the judgment-debtor not only declines to cooperate, she turns on the counsel for the judgment-creditor and complains to the North Carolina State Bar when he tried to contact her.

Thus, Plaintiff contends that he is entitled to recover from Farm Bureau the cost of litigating the case as well as the unpaid balance of the underlying judgment. However, in light of the holdings of *Wilson v. State Farm Auto* and *Wilson v. Wilson*, this Court must reject Plaintiff’s contention that his complaint sufficiently alleges a cause of action against Farm Bureau on the grounds that it in bad faith refused to settle Plaintiff’s original claim, and failed to properly protect its insured from an excess verdict.

Moreover, this Court’s holding in *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996), affords Plaintiff no relief. In that case we found privity between the plaintiff and the tortfeasor’s insurer and allowed an excess policy coverage claim for

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unfair and deceptive trade practices based on the insured's post judgment behavior towards the plaintiff. In this case, Plaintiff's legal grounds establish that he does not seek recovery from Farm Bureau for alleged misconduct against him, but rather, for Farm Bureau's alleged misconduct against its own insured. As such, *Murray* is inapplicable to this matter.

In sum, we uphold the trial court's dismissal of Plaintiff's action under Rule 12(b)(6).

Affirmed.

Judges HUDSON and STEPHENS concur.

The judges participated and submitted this opinion for filing prior to 1 January 2007.



NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. COUNTY OF DURHAM, DEFENDANT

No. COA06-283

(Filed 2 January 2007)

1. Appeal and Error—appealability—sovereign immunity—failure to prosecute—motion for costs

Although the denial of defendant county's motions to dismiss based on sovereign immunity affects a substantial right and is immediately appealable, those assignments of error based on the court's denial of the county's motion to dismiss for failure to prosecute and motion for costs are dismissed because the county failed to cite any authority for appeals from these interlocutory orders as required by N.C. R. App. P. 28(b)(4).

2. Immunity—sovereign—condemnation action between county and State

The trial court did not err in a condemnation action arising as part of a road-widening project for a state road in southwestern Durham County by denying defendant county's motion to dismiss based on sovereign immunity because the county's sovereign immunity cannot be superior to that of the State when the coun-

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ties derive their sovereign immunity and all other powers and authority from the State.

Appeal by defendant from order entered 19 October 2005 by Judge Steven A. Balog in the Superior Court in Durham County. Heard in the Court of Appeals 31 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General Spurgeon Fields, III, and Assistant Attorney General James M. Stanley, Jr., for plaintiff-appellee.

Assistant County Attorney Curtis Massey, for defendant-appellant.

HUDSON, Judge.

On 13 December 2004, the North Carolina Department of Transportation ("the DOT") commenced this action to condemn real property owned by the County of Durham ("the county"). On 7 January 2005, the county moved to dismiss for lack of personal and subject matter jurisdiction based on sovereign immunity, failure to allege a waiver of sovereign immunity, and lack of authority to take the property. On 3 August 2005, the county moved to dismiss for the DOT's failure to prosecute its case. On 30 August 2005, the county moved for an award of costs pursuant to N.C. Gen. Stat. § 136-119. On 12 September 2005, the court heard and denied all of the county's motions, and granted the DOT's oral motion to enter findings of fact and conclusions of law. The court entered said order on 19 October 2005. The county appeals. As discussed below, we affirm.

This condemnation action arises as part of a road-widening project for state road 15-501 in southwestern Durham County. At the hearing, the county presented affidavits indicating the property at issue was acquired as part of the New Hope Corridor Open Space Master Plan with partial funding from the Clean Water Management Trust Fund. The county conceded that the taking here was less than one acre of land and included temporary construction and drainage easements and a permanent drainage easement.

[1] This appeal is interlocutory.

An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Generally, the denial of a motion to dismiss is

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an interlocutory order from which there may be no immediate appeal. Nevertheless, [a]n interlocutory appeal is ordinarily permissible . . . if (1) the trial court certified the order under Rule 54(b) of the Rules of Civil Procedure, or (2) the order affects a substantial right that would be lost without immediate review.

McClenahan v. N.C. Sch. of the Arts, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (internal quotation marks and citations omitted). Appeals raising issues of sovereign immunity affect a substantial right and are immediately appealable. *Id.* The county properly cites authority for its appeal of the trial court's denial of its motions to dismiss based on sovereign immunity. However, the county also appeals from the trial court's denial of its motions to dismiss for the DOT's failure to prosecute its case and for costs. The county fails to cite any authority for these interlocutory appeals as required by Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379-80, 444 S.E.2d 252, 253-54 (1994). We dismiss those assignments of error based on the court's denial of the county's motion to dismiss for failure to prosecute and motion for costs.

[2] The county argues that the trial court erred in failing to dismiss based on its sovereign immunity. We do not agree.

The county contends that sovereign immunity bars a suit by the State to condemn real property for a highway-widening project and that it "enjoys the same sovereign immunity as the State . . ." The county cites *Dawes v. Nash County*, 357 N.C. 442, 584 S.E.2d 760, *reh'ing denied*, 357 N.C. 511, 587 S.E.2d 417 (2003), *Bell v. Commissioners of Johnston County*, 127 N.C. 57, 37 S.E. 136 (1900), and *Archer v. Rockingham County*, 144 N.C. App. 550, 548 S.E.2d 788 (2001), *disc. review denied*, 355 N.C. 210, 559 S.E.2d 796 (2002), for the proposition that sovereign immunity applies to counties as the units that collectively make up the State. However, none of these cases involves a suit between a county and the State itself, and our research reveals no case in which a county has been able to assert sovereign immunity against the State, which is the sovereign itself. This Court has recognized that

Article VII, Section 1 of the North Carolina Constitution gives the General Assembly the authority to provide for the organization and government of counties, including the granting of such powers and duties to the counties as it deems advisable. As an agent of the State, a county has no inherent power, but may exercise

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only those powers prescribed by statute and those necessarily implied by law.

In re Easement in Fairfield Park, 90 N.C. App. 303, 308, 368 S.E.2d 639, 641-42 (1988). Because the counties derive their sovereign immunity and all other powers and authority from the State, we conclude that the counties' sovereign immunity cannot be superior to that of the State. This assignment of error lacks merit.

Affirmed in part and dismissed in part.

Judges WYNN and STEPHENS concur.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

STATE OF NORTH CAROLINA v. MICHELLE CATHERINE THEER

No. COA05-1640

(Filed 16 January 2007)

1. Homicide— first-degree murder—conspiracy—sufficiency of evidence

There was sufficient evidence that defendant was a perpetrator in a prosecution for first-degree murder and conspiracy to murder. Although much of the evidence was circumstantial and did not rule out every hypothesis of innocence presented by the defense, it was ample and sufficient to allow the jury to make reasonable inferences of defendant's guilt.

2. Criminal Law— statements by trial judge—potential liability of witness—Fifth Amendment rights—not comment on guilt or credibility

There was no prejudice in a prosecution for first-degree murder and conspiracy from the trial judge's statements that a defense witness may have "potential liability" and that the witness "may have some Fifth Amendment rights" where the trial judge had appointed an attorney to protect the witness's Fifth Amendment rights; the trial judge thereafter stated that he had no prosecutorial responsibilities in the matter; and defense counsel

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was the first to elicit from the witness a possible charge of accessory to first-degree murder. Rather than expressing an impermissible opinion as to defendant's guilt or the witness's credibility, the trial judge was instead seeking to clarify that he had not threatened prosecution as suggested by defense counsel.

3. Evidence— character—alternative lifestyle—mental state, pattern of conduct, motive, corroboration

The admission of evidence about defendant's lifestyle and sexual activity was not an abuse of discretion in a prosecution for conspiracy and first-degree murder. The evidence was admissible to show a pattern of conduct, motive, and defendant's mental state, as well as to corroborate other witnesses. Limiting instructions were given and the court made extensive findings about the reasons for admitting the evidence.

4. Evidence— character—affairs—Wiccan religion—not prejudicial

Evidence about a first-degree murder defendant's affairs after her husband's death, her practice of the Wiccan religion, and her behavior in jail was not prejudicial in light of the overwhelming evidence of her alleged motive and involvement in the murder.

5. Evidence— character—cumulative effect—not prejudicial

In light of the overwhelming evidence of defendant's motive for and involvement in the murder of her husband, the cumulative effect of testimony about her alternative lifestyle and sexual activity was not prejudicial.

6. Evidence— character—improper relationship with counsel suggested—not plain error

There was no plain error in a first-degree murder prosecution where a witness suggested an improper relationship between defendant and her counsel. The statements were made in response to an unrelated question, came in the midst of a rambling non-answer, defense counsel cross-examined the witness on the subject and impeached her credibility, and a limiting instruction was given.

7. Criminal Law— mistrial denied—improper character evidence

The trial court did not abuse its discretion by denying a mistrial in a prosecution for conspiracy and first-degree murder after a witness offered inadmissible bad character evidence, including

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the suggestion of an improper relationship between defendant and her trial counsel. The judge's findings in support of the denial of the mistrial were well supported by reason and the judge's superior position for observing the jury.

8. Evidence— psychologist—testimony about marital counseling—admissibility

The admission of testimony from a psychologist who had provided marital counseling to defendant and her husband was not plain error where defendant was being prosecuted for conspiring and aiding and abetting in the murder of her husband. The psychologist's opinions relate to the state of defendant's marriage and to her attitude toward her husband and their marriage, neither of which meets the definition of character evidence. The evidence was relevant in light of the State's theory of the case, and defendant did not show a probable impact on the jury's finding of guilt. N.C.G.S. § 8C-1, Rule 405(a).

9. Evidence— marital counseling records—admissibility

The trial court did not abuse its discretion in a murder prosecution by compelling disclosure of a psychologist's records of marriage counseling sessions between defendant and her husband, the victim. The state of the marriage was a central issue in the trial and the court reviewed the records before disclosure. N.C.G.S. § 8-53.3.

10. Evidence— murdered husband's affairs—properly excluded

The exclusion of evidence about a murdered husband's alternative lifestyle and extra marital affairs was not an abuse of discretion, and there was no prejudice, where similar evidence regarding defendant had been admitted as relevant to her state of mind, but the victim's state of mind was not in issue. Moreover, the evidence was admitted through other witnesses.

11. Constitutional Law— references to pre-arrest exercise of rights—not plain error

The State's references to defendant's pre-arrest exercise of her constitutional rights to silence and counsel did not involve plain or ex mero motu error.

12. Criminal Law— defense counsel admonished—nine comments in ten weeks—no prejudice to defendant

Nine comments by which the court admonished defense counsel about inappropriate or improper questions during a

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ten-week trial did not prejudice defendant or deprive her of a fair trial.

13. Criminal Law— prosecutor’s closing arguments—no intervention ex mero motu

There was no error in the trial court’s failure to intervene when certain remarks were made by the prosecutor during the State’s closing argument in a first-degree murder prosecution. Although the prosecutor referred to defendant’s “burden,” the reference was followed by a clear statement of the State’s burden of proof and was designed to suggest that defendant had not contradicted the State’s evidence. Passing references to the victim and his mother did not improperly emphasize sympathy or pity for the victim’s family, and comments about why the State’s evidence should be believed or why a witness should not be believed did not rise to the level of gross impropriety.

14. Evidence— computer searches for body bags—not prejudicial

The admission of information found on defendant’s computer concerning body bags was not prejudicial, even if the evidence was irrelevant, because these were just three of many documents reviewed by the court and exhibits submitted by the State, and because the evidence of guilt was overwhelming.

15. Homicide— first-degree murder—short form indictment—not error

Use of the short-form indictment for first-degree murder did not result the conviction being vacated.

Appeal by Defendant from judgment entered 3 December 2004 by Judge E. Lynn Johnson in Superior Court, Cumberland County. Heard in the Court of Appeals 14 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell and Assistant Attorney General Kathleen U. Baldwin, for the State.

Daniel R. Pollitt, Assistant Appellate Defender, for the defendant-appellant.

WYNN, Judge.

On 3 December 2004, Defendant Michelle Catherine Theer was convicted of first-degree murder by aiding and abetting and of con-

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spiracy to commit first-degree murder in the death of her husband, United States Air Force Captain Frank Martin Theer. Defendant appeals to this Court, challenging the sufficiency of the evidence to convict her and arguing that the trial court committed either error or plain error in her trial. Upon our careful review of her appeal, we hold that Defendant received a fair trial that was free of prejudicial error.

At trial, the evidence tended to show that the Theers married in 1991 and subsequently lived in several different states as Captain Theer was stationed at Air Force bases around the country. In 1999, the couple moved to Fayetteville, where Captain Theer was posted on Pope Air Force Base and Defendant was employed by psychologist Thomas Harbin, as she worked toward getting her own permanent license as a psychologist. Throughout this time, Captain Theer was often deployed overseas and away from home for long stretches of time, and the marriage struggled.

In early 2000, Defendant met United States Army Sergeant John Diamond, a Special Forces soldier stationed in Fayetteville at Fort Bragg, via the Internet and began an extramarital affair with him. In June 2000, Defendant rented her own apartment and lived separately from Captain Theer; the two started marital counseling in July while also going through a trial separation. In October, Defendant reconciled with Captain Theer, moving back into their home and telling Dr. Harbin that she planned to end her affair with Sergeant Diamond. In November, Sergeant Diamond sent e-mails to Defendant indicating he was unhappy about the possibility of their relationship ending and Defendant's remaining with her husband. On 9 December 2000, Defendant met and engaged in sexual relations with Sergeant Diamond in Raleigh, after telling Captain Theer she was going there to celebrate her birthday with a graduate school classmate.

On 17 December 2000, Defendant and Captain Theer traveled from Fayetteville to Cary with Dr. Harbin, his wife, and another couple, for a dinner to celebrate the holidays. Around 9:00 or 9:30 p.m., as the group prepared to leave the restaurant, Defendant went to the restroom and made a cell phone call to Sergeant Diamond, who was watching a video with his estranged wife and mother-in-law. After the phone call, Sergeant Diamond put on cold-weather clothing and left the house.

Meanwhile, Defendant and Captain Theer took the other couple back to Dr. Harbin's office in Fayetteville, where they had left their car, arriving around 10:30 p.m. Thereafter, Defendant and her hus-

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band left the parking lot but returned approximately ten to fifteen minutes later after Defendant “remembered that she needed a reference book from her office to prepare for two book reports . . . due the next day.” Defendant later told the police that Captain Theer waited outside while she went inside Dr. Harbin’s office to get the books. Shortly thereafter, she heard gunshots, ran outside, and found Captain Theer, unresponsive, at the bottom of the steps outside of the building. Defendant stated that because she had accidentally locked her keys inside the building when she went outside, she ran to a late-night video store about a block away to get help. Captain Theer died as a result of five gunshot wounds, including one fired at close range just behind his left ear.

Following Captain Theer’s death, Defendant continued her relationship with Sergeant Diamond, including taking a trip to Florida together. Police later linked Sergeant Diamond to a semiautomatic pistol that was of the same model used to kill Captain Theer. However, after Sergeant Diamond learned that the police wanted to obtain the pistol for ballistics testing, he reported that his vehicle had been broken into on base and the weapon stolen.

As a result of his statements regarding the pistol, military authorities charged Sergeant Diamond with making a false official statement, false swearing, and obstruction of justice. Around 20 February 2001, he was placed into pre-trial confinement at a military facility. Sergeant Diamond was later charged with and convicted by a General Court-Martial of murder and conspiracy to commit murder in the death of Captain Theer and sentenced to life in prison without parole.

On 21 May 2002, Defendant was indicted for first-degree murder and conspiracy to commit first-degree murder in the death of Captain Theer. However, around the date of the indictment, Defendant, who had moved to New Orleans since the murder, left from there, reportedly to “start a new life.” She moved to Florida, where she rented an apartment and had plastic surgery performed under an assumed name. Files and documents found in her Florida apartment indicated Defendant had a long-range plan to create several false identities and essentially to “disappear.”

Police located and arrested Defendant in August 2002, and her trial began on 27 September 2004. At the conclusion of the nearly three-month trial, the jury returned verdicts of guilty of first-degree murder by aiding and abetting, and of conspiracy to commit first-

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degree murder. The trial court sentenced Defendant to life in prison without parole.

Before this Court, Defendant appeals from those verdicts, arguing (I) the trial court erred by denying her motion to dismiss the charges of first-degree murder and conspiracy to commit first-degree murder because the State presented insufficient evidence that she was a perpetrator of the crimes charged; (II) the trial court improperly expressed opinions about her guilt and defense witness Angela Forcier's credibility; (III) the trial court erroneously admitted irrelevant evidence and argument about her bad character; (IV) the trial court improperly denied her motion for a mistrial based on inadmissible evidence; (V) the trial court erroneously allowed inadmissible and privileged witness testimony concerning her marital counseling; (VI) the trial court erroneously excluded relevant defense evidence; (VII) the trial court committed plain error by allowing State evidence and argument as to her exercise of her constitutional rights to silence and counsel; (VIII) the trial court improperly belittled her trial counsel and denied her motion for a mistrial based on that conduct; (IX) the prosecutor's closing argument was *ex mero motu* error; (X) the trial court erroneously admitted State evidence about computer documents related to body bags; and, (XI) the indictment was insufficient.

I.

[1] Defendant argues that the trial court erred by denying her motion to dismiss the charges of first-degree murder and conspiracy to commit first-degree murder. She contends that the State failed to present sufficient evidence that she was a perpetrator. We disagree.

“When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004) (citation and quotations omitted), cert. denied, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005); see also *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004), cert. denied, 126 S. Ct. 47, 163 L. Ed. 2d 79 (2005); *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). Our Supreme Court has defined “substantial evidence” as “relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.” *Garcia*, 358 N.C. at 412, 597 S.E.2d at 746 (citations omitted).

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Additionally, “[i]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.” *Butler*, 356 N.C. at 145, 567 S.E.2d at 140 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). In considering a motion to dismiss by the defense, such evidence “must be taken in the light most favorable to the state. . . . [which] is entitled to all reasonable inferences that may be drawn from the evidence.” *State v. Sumpter*, 318 N.C. 102, 107, 347 S.E.2d 396, 399 (1986).

Nevertheless, if the evidence is “sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed.” *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (internal citation omitted). “This is true even though the suspicion aroused by the evidence is strong.” *Id.* (internal citation omitted). However, “[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.” *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (citation and quotation omitted), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). As our Supreme Court has noted,

There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. This is the way people often reason in everyday life. In this case the inferences on inferences dealt with proving the facts constituting the elements of the crime. We hold that the jury could properly do this.

State v. Childress, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987).

Here, Defendant contends that there was insufficient evidence that she (1) knowingly advised, instigated, encouraged, procured, or aided Sergeant Diamond to commit first-degree murder, or (2) entered into an agreement with Sergeant Diamond to commit first-degree murder. See *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996) (outlining required elements for aiding and abetting a crime), *cert. denied*, 521 U.S. 1124, 138 L. Ed. 2d 1022 (1997); *State v. Merrill*, 138 N.C. App. 215, 218, 530 S.E.2d 608, 611 (2000) (outlining required elements for conspiracy to commit murder).

While true that much of the State’s evidence as to Defendant’s involvement in the murder was circumstantial, and the evidence did

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“not rule out every hypothesis of innocence” presented by the defense, including that Mr. Diamond acted alone, we find that the State introduced ample and sufficient evidence to allow the jury to make reasonable inferences of Defendant’s guilt as to each element of the crimes charged. Indeed, testimony and exhibits offered by the State tended to prove Defendant’s affair with Sergeant Diamond, ongoing problems in her marriage to Captain Theer, her financial status and the insurance payout, and her suspicious behavior and flight following the murder—all of which could reasonably give rise to inferences that would “prov[e] the facts constituting the elements of the crime,” even if evidence also existed to the contrary. We hold that sufficient evidence was offered to show that Defendant was a perpetrator of the crimes charged. Accordingly, we uphold the trial court’s denial of Defendant’s motion to dismiss.

II.

[2] Next, we address Defendant’s argument that she is entitled to a new trial because the trial court improperly expressed an opinion as to her guilt and as to the credibility of a defense witness. We disagree.

The exchange at issue involved the testimony of Defendant’s sister, Angela Forcier, during Defendant’s case-in-chief. Before Ms. Forcier’s testimony, the trial court excused the jury from the courtroom and appointed a local attorney to advise her about her Fifth Amendment rights regarding the possibility of being an accessory-after-the-fact to first-degree murder. After recessing for the day to allow Ms. Forcier the opportunity to consult with counsel, Ms. Forcier elected to take the stand the following morning. With Ms. Forcier’s appointed attorney present during her testimony, the trial judge informed the jury that the attorney “was appointed by this Court to protect any Fifth Amendment rights Ms. Forcier may have in the trial of this matter and he will advise her, if necessary.”

On direct examination, defense counsel asked Ms. Forcier if she was being threatened with prosecution in this matter. When Ms. Forcier answered that she was “threatened with prosecution for accessory after the fact of murder,” the trial judge stopped the questioning and inquired if defense counsel was referring to what the trial judge had said the day before, to which the defense counsel ultimately replied, “I acknowledge that you had just warned her.” Thereafter, the trial court addressed the jury, stating:

THE COURT: Ladies and gentlemen of the jury, on yesterday’s date, when I sent you out, I simply advised Ms. Forcier of her potential

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liability in this case of being . . . an accessory after the fact, that she may have some Fifth Amendment rights. It is not my responsibility to prosecute any action in this case. So that's a mischaracter—misstatement . . . Do you acknowledge that?

DEFENSE COUNSEL: . . . I acknowledge that you just warned her.

. . .

THE COURT: I said she had some Fifth Amendment rights and she stood liable for accessory after the fact.

DEFENSE COUNSEL: To first degree murder.

THE COURT: Correct.

Defendant contends that this exchange was an improper expression by the trial court as to her guilt and the credibility of Ms. Forcier as a witness, since Defendant would have to be guilty of first-degree murder in order for Ms. Forcier to be guilty of accessory after the fact to first-degree murder. *See State v. Freeman*, 280 N.C. 622, 626, 187 S.E.2d 59, 62-63 (1972) (“[I]t is error for the trial judge to express or imply . . . any opinion as to the guilt . . . of the defendant . . . or as to the credibility of any witness.”). Such a statement would be improper if “a juror could reasonably infer therefrom that the judge was intimating an opinion as to the credibility of the witness or as to any fact to be determined by the jury.” *Id.* at 628, 187 S.E.2d at 63.

Our standard of review in considering this exchange is whether it created “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a) (2005). If Defendant succeeds in showing prejudice from the exchange, “[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.” N.C. Gen. Stat. § 15A-1443(b) (2005). However, “[a] defendant is not prejudiced . . . by error resulting from his own conduct.” N.C. Gen. Stat. § 15A-1443(c) (2005); *see also State v. Payne*, 280 N.C. 170, 171, 185 S.E.2d 101, 102 (1971) (“Ordinarily one who causes or . . . joins in causing the court to commit error is not in a position to repudiate his action and assign it as ground for a new trial.”).

Here, Defendant’s counsel “join[ed] in causing the court to commit error,” such that we conclude there was no prejudice to Defendant stemming from the objected-to exchange. In his statements while the jury was present, the trial judge referred to Ms. Forcier’s

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“potential liability” and that she “may have some Fifth Amendment rights,” while also stating that he had no prosecutorial responsibilities in the matter. Defense counsel, however, was the first to elicit from Ms. Forcier the possible charge of accessory after the fact to first-degree murder, which he subsequently reiterated in front of the jury during his exchange with the trial judge.

Rather than expressing an impermissible opinion as to Defendant’s guilt or Ms. Forcier’s credibility, we find that the trial judge was instead seeking to remedy the situation by clarifying that he had not threatened prosecution, as suggested by defense counsel, and to thereby avoid prejudice, not cause it. We recognize that the trial court’s statement that Ms. Forcier “stood liable for accessory after the fact” perhaps went too far in its forcefulness; however, we also note that Ms. Forcier’s testimony in front of the jury might have in fact enhanced her credibility as a witness who felt strongly enough still to testify, even in the face of such threat.¹ Accordingly, we find no merit to this assignment of error.

III.

[3] Defendant next argues that she is entitled to a new trial because the trial court erroneously admitted the State’s irrelevant evidence and argument about her bad character, in contravention of Rules of Evidence 401-404 and the Fourteenth Amendment to the U.S. Constitution.²

A trial court’s rulings under Rule 403 are reviewed for an abuse of discretion, *see State v. Lanier*, 165 N.C. App. 337, 345, 598 S.E.2d 596, 602, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 59 (2004), as are those under Rule 404(b). *See State v. al-Bayyinah*, 359 N.C. 741, 747, 616 S.E.2d 500, 506 (2005) (“Whether to exclude evidence is a deci-

1. Moreover, Ms. Forcier was not the only witness whom the jury saw with her own counsel sitting beside her; the trial judge also instructed the counsel for State witness Rosaida Rivera to sit beside her while she testified and informed the jury that the appointed attorney was there “representing any Fifth Amendment interests that Ms. Rivera may have” and that the attorney “may consult [the witness] at any time concerning any issues that may arise.” Similarly, Dr. Kenneth Kastleman, who had provided marital counseling to the Theers, had an attorney present during his testimony to represent his interests. The fact that the jury saw the same treatment of other witnesses lessens the potentially prejudicial impact of the trial court’s statements concerning Ms. Forcier.

2. Although Defendant refers to a violation of the Fourteenth Amendment in her brief, she offers no argument or citations in support of this contention. Accordingly, she did not preserve her constitutional claims regarding this evidence. *See* N.C. R. App. P. 28(b)(6).

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sion within the trial court's discretion."), *cert. denied*, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Campbell*, 359 N.C. 644, 673, 617 S.E.2d 1, 19 (2005) (citation and quotation omitted), *cert. denied*, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006). Although rulings under Rule 401 "are not discretionary and therefore are not reviewed under the abuse of discretion standard," we also note that "such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (internal citations omitted), *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In her appeal, Defendant argued prejudicial, plain, and *ex mero motu* error as to the evidence and testimony challenged in this argument. However, she failed to distinguish as to the specific grounds for objection and appropriate standard of review concerning the testimony of each of the eighteen witnesses she challenges. Nevertheless, even assuming *arguendo* that the objected-to testimony was error in each instance, thereby giving Defendant the benefit of the most favorable standard of review, we hold that its admission was not prejudicial to Defendant. *See* N.C. Gen. Stat. § 15-1443(a) ("A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice . . . is upon the defendant.").

Defendant takes specific issue with witness testimony concerning, among other things, her refusal to have children, her sexual promiscuity and affairs during her marriage and after her husband's death, her "alternative" lifestyle including classified Internet ads seeking sexual partners and "swinging," her belief in the Wiccan religion, and her ability to manipulate others, particularly men.

Regarding the testimony of Charles McLendon, a man with whom Defendant had an extramarital affair from late 1999 to early 2000, the trial court overruled defense counsel's objection "based upon the [North Carolina] rules of evidence," finding that his testimony was "relevant on the issues of motive, pattern of conduct on using the Internet to engage in sexual liaisons, and the status of the apparent disengagement from [Defendant's] husband, Frank Martin Theer." The trial judge also instructed the jury that Mr. McLendon's testimony should be received for only those limited purposes, as well as for the mental state of Defendant.

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Likewise, after reviewing eight boxes of some 21,000 documents and computer records, the trial court found that

The marital relationship between the defendant and Frank Martin Theer, the length and depth of the disengagement between the defendant and Frank Martin Theer in their marriage, thus the motive and marital state of the defendant leading up to December 17, 2000, are relevant for the jury's consideration. It is also relevant on the issue of the process which the defendant utilized during the disengagement from Frank Martin Theer and in corroboration of the testimony of Charles McLendon.

The relationship of the defendant to John Diamond and the defendant's relationship to her husband, Frank Martin Theer, have now become a substantial and material matter and, thus, the mental state of the defendant at the time of the death of Frank Martin Theer as well as the motive on the part of the defendant. The matters dealing with an alternative life-style may reflect not only the degree of engagement with John Diamond but also the degree of disengagement from her husband, Frank Martin Theer, at the time of his death.

. . . The Court has considered this matter under Rule 403. The defendant's motion is denied. The Court will give a limiting instruction accordingly.

A limiting instruction was later given to the jury, bidding them to receive evidence as to Defendant's Internet posting and alternative lifestyle for the "limited purpose of [their] evaluation of the marital status of the defendant and Frank Martin Theer, any motive in this particular case, corroboration of the prior testimony of Charles McLendon and, thus, [their] evaluation of the mental state of the defendant."

Defendant argues that this testimony about the computer documents and e-mails should have been excluded as bad character evidence, as it made her out to be a "moral degenerate" and went beyond simply chronicling her extramarital affairs. *See State v. Small*, 301 N.C. 407, 432-33, 272 S.E.2d 128, 143-44 (1980), superseded by statute on other grounds as stated in *State v. Woods*, 307 N.C. 213, 217-18, 297 S.E.2d 574, 577 (1982). However, as our Supreme Court similarly concluded in *Small*, "[w]e are satisfied . . . that given the admissibility of the fact that defendant had sexual relations with other[s], the outcome of the trial would not have been different had this bit of embellishment not been admitted." *Id.* at 433, 272 S.E.2d at 144.

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Moreover, as the trial court found and instructed the jury, the evidence in question was properly admitted for another, permissible purpose, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.” N.C. Gen. Stat. § 8C-1, Rule 404(b). Likewise, in light of the trial court’s extensive findings on the record concerning his reasons for admitting this evidence, we conclude his rulings were neither unsupported by reason nor arbitrary and thus were not an abuse of discretion. *See Campbell*, 359 N.C. at 673, 617 S.E.2d at 19. As such, we uphold the trial court’s finding that the probative value of this evidence was not “substantially outweighed” by its prejudicial effect. N.C. Gen. Stat. § 8C-1, Rule 403.

[4] Turning now to the evidence of Defendant’s affairs while living in Florida after her husband’s death, as well as her alleged practice of the Wiccan religion and her behavior while in jail, we acknowledge that this evidence had a tenuous, at best, relevance to the question of Defendant’s guilt. However, even assuming *arguendo* that it was error to admit this evidence, we hold that it was not prejudicial in light of the overwhelming amount of evidence presented by the State as to Defendant’s alleged motive and involvement in the murder. After reviewing all of the testimony and transcript in this case, we are unpersuaded that, but for this evidence, Defendant would have been acquitted of the crimes charged. *See* N.C. Gen. Stat. § 15-1443(a).

[5] Additionally, although Defendant seems to argue that the cumulative effect of these evidentiary rulings should entitle her to a new trial, we believe that, even when taken as a whole, the evidentiary rulings in question did not deprive Defendant of a fair trial. This evidence went to Defendant’s motive and state of mind with respect to her husband’s death; it did not include any suggestion that she had committed similar crimes in the past. *See State v. Anthony*, 354 N.C. 372, 423, 555 S.E.2d 557, 589 (“In light of the great weight of evidence against defendant presented at trial, we hold that the combined effect of any erroneous evidentiary rulings was not prejudicial to defendant.”) (2001), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002); *State v. Beane*, 146 N.C. App. 220, 234, 552 S.E.2d 193, 202 (2001) (“[W]e find no merit in defendant’s final argument that he was prejudiced by the cumulative effect of the trial court’s alleged errors.”), *appeal dismissed*, 355 N.C. 350, 563 S.E.2d 562 (2002); *but see State v. White*, 331 N.C. 604, 616, 419 S.E.2d 557, 564 (1992) (finding the cumulative effect of evidence as to the defendant’s commission of two similar crimes in the past to have deprived him of his fundamental right to a fair trial).

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For the foregoing reasons, we find no merit in this assignment of error.

IV.

[6] Next, Defendant argues she is entitled to a new trial because the trial court improperly denied her motion for a mistrial following inadmissible bad character evidence offered by witness Rosaida Rivera, including the suggestion of an improper relationship between Defendant and her trial counsel. Defendant contends that admission of the testimony was plain error, and that denial of the motion for mistrial was an abuse of discretion. She specifically objects to the following statements made by Ms. Rivera on direct examination:

A: . . . I told her about her lawyer, about her and her lawyer used to get these—these special contact visits. How they were real close. She used to—before she'd go see her lawyer, she always used to take these little—a whole bunch of paper, which—about her case and stuff like that that she would take to her lawyer. She would brag on her lawyer was so good and how sweet her lawyer is. And people suspected, you know, that her and her lawyer were a little too close than most lawyers would be with a client but how she'd get little special things that no other inmate can get unless her lawyer would bring it in. That would be like erasers and pads, what else?

These statements were made in response to an unrelated question by the prosecution, and in fact came in the midst of what might be characterized as a rambling non-answer by Ms. Rivera. Defendant asserts that the suggestion of an improper relationship with her trial counsel impaired the latter's ability to effectively represent her and caused her substantial and irreparable prejudice.

The plain error rule “is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record,” the error is found to have been “so basic, so prejudicial, so lacking in its elements that justice cannot have been done” or that it had “a probable impact on the jury’s finding that the defendant was guilty.” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (internal citation and quotation omitted).

Here, because defense counsel did not object at trial to the substance of Ms. Rivera’s testimony, and thus did not preserve the issue on appeal, we may only review the evidence under the plain

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error standard. To that end, we note that defense counsel did cross-examine Ms. Rivera concerning her claims of an improper relationship, drawing the jury's attention to the strict conditions of Defendant's imprisonment and monitored meetings with her attorneys.³ He further impeached Ms. Rivera's credibility by reviewing her extensive criminal record. Moreover, at the close of all evidence, the trial court specifically instructed the jury that

There is evidence which tends to show that the witness Rosaida Rivera solicited help from the State of North Carolina in exchange for her testimony. If you find that she testified in whole or in part for this reason, you should examine her testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

In light of the curative effect of the cross-examination of Ms. Rivera and the trial court's instructions to the jury concerning her testimony, we decline to find plain error in the admission of Ms. Rivera's testimony.

[7] The trial court is required to declare a mistrial upon a defendant's motion "if there occurs during the trial an error or legal defect in the proceedings, . . . , resulting in substantial and irreparable prejudice to the defendant's case." N.C. Gen. Stat. § 15A-1061 (2005); *State v. Tirado*, 358 N.C. 551, 585, 599 S.E.2d 515, 538 (2004), *cert. denied*, *Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005). The decision whether to grant a mistrial is within the trial court's discretion and will be given "great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. Williamson*, 333 N.C. 128, 138, 423 S.E.2d 766, 772 (1992). This Court will find an abuse of discretion only where a trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19.

Here, after reviewing the arguments for the State and Defendant as to Defendant's motion for mistrial, the trial court entered findings as to Ms. Rivera's testimony that included the following:

3. We also point out that, after Ms. Rivera made the statement recounted above, the prosecution did not pursue the suggestion of an improper relationship any further. In the course of cross-examination, however, defense counsel elicited the first and only mention of possible sexual contact between Defendant and himself.

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Paragraph three, there is a substantial body of evidence before the jury that could cause a finder of fact to view Rosaida Rivera's testimony with great care and caution . . .

Paragraph four, it is also worthy of note that no objection nor any motion to strike was raised by the defendant—defendant's counsel . . . cross-examined Rivera about the security when contact visits were permitted including windows through which jail personnel could observe the contact visit.

. . .

Paragraph six, it is the Court's judgment borne of 22 years of experience as a trial judge as well as input from fellow trial judges that testimony such as Rosaida Rivera's is generally viewed with skepticism by jurors. Additionally, Rosaida Rivera's testimony represented only a very small piece of a very extensive and substantiated circumstantial case against the defendant.

The trial judge based the denial of the motion for mistrial on these findings, which we conclude to be well supported by reason and the trial judge's superior position to observe the jury. We therefore decline to disturb the trial court's ruling on appeal.

V.

[8] Defendant next contends that she is entitled to a new trial because the trial court erroneously admitted inadmissible and privileged opinion and hearsay testimony from Dr. Kenneth Kastleman, a clinical psychologist who provided marital counseling to Defendant and Captain Theer. We disagree.

At the outset, we note that Defendant's objections at trial to Dr. Kastleman's testimony were based on psychologist-patient and marital privilege, as well as constitutional grounds.⁴ Because she did not offer evidentiary arguments at trial regarding the testimony, we review those contentions here under a plain error standard, as articulated above. *See N.C. R. App. P. 10^(c)(4)*. We review the trial court's decision to compel disclosure of what would otherwise be privileged information under an abuse of discretion standard. *See State v. Smith*, 347 N.C. 453, 461, 496 S.E.2d 357, 362 ("The decision that dis-

4. In her assignments of error to this Court, Defendant alleges that the admission of this testimony violated her state and federal constitutional rights. However, her brief argues only that the testimony violated various Rules of Evidence. Accordingly, Defendant did not preserve her constitutional claims as to this evidence. *See N.C. R. App. P. 28(b)(6)*.

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closure is necessary to a proper administration of justice is one made in the discretion of the trial judge, and the defendant must show an abuse of discretion in order to successfully challenge the ruling.”) (internal citation and quotation omitted), *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d (1998).

Defendant specifically objects to Dr. Kastleman’s testimony that during their sessions in the summer of 2000, Defendant was “not looking for common ground” in the marriage, that she was “establishing boundaries” toward her husband and getting “separation” from him, and that she was “attempting to distance herself from” the marriage and not “motivated to undertake therapy.” He further testified that Captain Theer “did indeed want to make [the marriage] work,” was “attempting to accommodate to [Defendant’s] wishes,” and that he felt “he and [Defendant] could work out their problems together.” Dr. Kastleman also stated that Captain Theer said that he was “the one putting all the energy in trying to get things back together” and that he guessed Defendant did not love him anymore and he did not “understand why she doesn’t want to be together.”

Defendant argues that these statements and opinions constituted impermissible expert testimony on character, in violation of North Carolina Rule of Evidence 405(a). *See N.C. Gen. Stat. § 8C-1, Rule 405(a)* (2005) (“Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.”). After a careful review of all of Dr. Kastleman’s testimony, we find that his opinions related to the state of the Theer marriage and Defendant’s attitude toward her husband and her marriage, neither of which meet the definition of character evidence. *See State v. Baldwin*, 125 N.C. App. 530, 536, 482 S.E.2d 1, 5 (“Character is a generalized description of a person’s disposition, or of the disposition in respect to a general trait . . .”) (internal citation and quotation omitted), *disc. review improvidently allowed*, 347 N.C. 348, 492 S.E.2d 354 (1997). Additionally, he made no impermissible statements nor suggestions as to Defendant’s guilt. *See State v. Mixion*, 110 N.C. App. 138, 145, 429 S.E.2d 363, 367 (“In North Carolina an expert may not express an opinion regarding the guilt or innocence of a defendant.”), *disc. review denied*, 334 N.C. 437, 433 S.E.2d 183 (1993). We thus conclude that admission of the testimony did not violate Rule 405(a).

Defendant also contends that the testimony violated Rules of Evidence 401-403 as to relevance and prejudicial effect, Rules

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701-702 as to opinion and expert testimony, and Rules 801-803 as to hearsay. *See* N.C. Gen. Stat. § 8C-1, Rules of Evidence (2005). We find these arguments to be without merit, particularly under a plain error standard. *See State v. Cummings*, 352 N.C. 600, 636-37, 536 S.E.2d 36, 61 (2000) (holding that the “bare assertion” of plain error in an assignment of error, without accompanying explanation, analysis, or specific contentions in a defendant’s brief, is insufficient to show plain error), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). In light of the State’s theory of the case, that Defendant conspired with and aided and abetted Sergeant Diamond in the murder of her husband, the testimony of their marriage counselor was surely relevant. Furthermore, Defendant has failed to make any argument or showing in her brief that the testimony as to Captain Theer’s statements had “a probable impact on the jury’s finding that the defendant was guilty.” *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

[9] Defendant also argues that the trial court erred by compelling disclosure of Dr. Kastleman’s records of his counseling sessions with the Theers. The trial court ordered the disclosure of the counseling session records “in the interest of the administration of justice and pursuant to North Carolina General Statute 8-53.3.”

Indeed, our legislature has seen fit to give trial judges such discretion to compel the disclosure of what would otherwise be privileged communications between psychologist and patient. *See* N.C. Gen. Stat. § 8-53.3 (2005) (“Any resident or presiding judge in the district in which the action is pending may . . . compel disclosure, . . . if in his or her opinion disclosure is necessary to a proper administration of justice.”). Given that the state of the Theer marriage was a central issue in the trial as to Defendant’s alleged motive for the crime, and that the trial judge himself reviewed the records prior to their disclosure, we find no abuse of discretion by the trial judge regarding this issue.

VI.

[10] Defendant next argues that she is entitled to a new trial because the trial court improperly excluded relevant defense evidence about Captain Theer’s alternative lifestyle. We disagree.

We review the admissibility of expert testimony under an abuse of discretion standard. *See State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463 (“In applying [Rule 702], the trial court is afforded

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wide discretion and will be reversed only for an abuse of that discretion."), *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988).⁵

Defendant specifically objects to the exclusion of portions of testimony offered by two clinical psychologists, Dr. Deborah Layton-Tholl and Dr. Donald Stewart. Dr. Layton-Tholl was qualified as an expert in the fields of psychology and extramarital affairs; she interviewed Defendant and reviewed documents and e-mails related to the case. Dr. Stewart is a clinical psychologist in Florida who provided marital counseling to Defendant and her husband in 1997.

After hearing from the defense as to what information Dr. Layton-Tholl and Dr. Stewart planned to offer, the trial court excluded any testimony that was based on statements made by Defendant to either psychologist.⁶ In doing so, the trial court referred on the record to our Supreme Court's holding in *State v. Prevatt*, noting that

It is well settled that an expert must be allowed to testify to the basis of her opinion. *State v. Ward*, 338 N.C. 64, 105-06, 449 S.E.2d 709, 732 (1994), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995). Nonetheless, admission of the basis of an expert's opinion is not automatic. *State v. Workman*, 344 N.C. 482, 495, 476 S.E.2d 301, 308 (1996). **The trial court, in its discretion, must determine whether the statements in issue are reliable, especially if the statements are self-serving**

5. Although Defendant again asserts constitutional error in the section of her brief devoted to this issue, she fails to present any argument or citations to that effect. Accordingly, her constitutional arguments are deemed abandoned, *see N.C. R. App. P. 28(b)(6)*, and we consider only her objections on the grounds of the North Carolina Rules of Evidence.

6. With respect to Dr. Stewart's testimony, the trial court also excluded any information that was gained from statements made by Captain Theer, on the basis that he had not waived the psychotherapist-patient privilege provided by Florida law, even if Defendant had. The Florida statute allows the privilege to be penetrated

For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense.

Fla. Stat. Ann. § 90.503(4)^(c) (2006). Without providing any supporting case law or argument, Defendant asserts that "the State was using Marty's mental condition as an element of a legal claim," such that the privilege should be penetrated, and that "the Trial Court incorrectly applied Florida rather than North Carolina law." Given that the marital counseling in question was conducted in Florida, and that the State put at issue only Defendant's state of mind and the status of the marriage as a whole, not Captain Theer's state of mind, we find these arguments without merit.

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and the defendant is not available for cross-examination.

Id. Moreover, if the statements appear unnecessary to the expert's opinion, exclusion of the basis may be proper. *State v. Baldwin*, 330 N.C. 446, 457, 412 S.E.2d 31, 38 (1992).

356 N.C. 178, 233, 570 S.E.2d 440, 470 (2002) (emphasis added), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). The trial court here noted that statements made to the two psychologists by Defendant would have been self-serving and that they would be allowed only if Defendant elected to testify. Both witnesses were, however, permitted to testify as to other facts at issue. Dr. Layton-Tholl offered extensive testimony concerning her research into extramarital affairs and specifically her opinions on the relationship between Defendant and Sergeant Diamond, including why Defendant might have vacillated between her husband and Sergeant Diamond and why she might have continued her relationship with Sergeant Diamond after Captain Theer's death. Dr. Stewart testified that he had provided marital counseling to Defendant and her husband and had recommended to Captain Theer's commanding officer that his scheduled transfer be postponed in order for the couple to receive additional counseling.

Defendant contends that, under the trial court's previous evidentiary rulings and Rules of Evidence 401-403 as to relevance, Dr. Layton-Tholl and Dr. Stewart should have been allowed to testify in full as to Captain Theer's extramarital affairs and "alternative lifestyle" in order to show a direct correlation between his behavior and Defendant's state of mind. The trial court found the evidence to be related to Captain Theer's state of mind, not Defendant's; he therefore excluded the expert witness testimony that might have involved their opinions of Captain Theer's state of mind, saying that "The victim's state of mind is not relevant in this trial. Her state of mind is, not what his attitude was towards her."

The trial court's position on this question is reflected in the following exchange from the transcript, conducted outside the presence of the jury:

DEFENSE COUNSEL: But the state and the Court has made Marty's state of mind relevant in this matter. You've admitted, you know, Dr. Kastleman's records. The state has, you know, hammered home how Marty said this and said that and so forth and, you know, that became—that became an issue in this case by them raising Marty's state of mind.

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THE COURT: Frank Martin Theer was assassinated on December 17th of 2000. If the facts in this case show that this arose out of spousal abuse and that they had a shoot-out at the O.K. Corral and you wanted to develop the history between these two individuals, then it may be relevant. But the fact pattern in this case is very simple. Some individual, the state contends it being John Diamond, hid behind some bushes and at some point in time, apparently Frank Martin Theer went up the rear steps of 2500 Raeford Road and some person, the state contends being John Diamond, shot Frank Martin Theer four times and apparently the state contends that once he was on the ground, some person came up and put a bullet through his brain. The mental state of Frank Martin Theer in this case is not relevant.

DEFENSE COUNSEL: When they have paraded in front of this jury, you know, the extramarital affairs of Michelle Theer—

THE COURT: They are held relevant as to her state of mind and her reasons or the attribution being made by the state as to why she would want to have Frank Martin Theer killed.

In reviewing this exchange between the trial court and defense counsel, it is clear to us that the trial court did not make a ruling that “is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Campbell*, 359 N.C. at 673, 617 S.E.2d at 19.

Furthermore, we note that Defendant was able to introduce evidence of Captain Theer’s alleged extramarital affairs and Internet activities through other witnesses. Thus, even assuming *arguendo* that it was error to exclude the evidence, Defendant has failed to show “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.” N.C. Gen. Stat. § 15A-1443(a). We conclude that this assignment of error is without merit.

VII.

[11] Defendant also contends that she is entitled to a new trial because the trial court committed plain and *ex mero motu* error by allowing State evidence and argument about her exercise of her constitutional rights to silence and counsel. We disagree.

Defendant points to a number of instances in which the State made reference at trial to her “pre-trial exercise of her constitutional rights to silence and counsel.” It is telling that she refers to this “pre-

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trial exercise," as the references are all to instances in which a witness testified to Defendant's invocation of her rights to counsel and to remain silent *prior to being arrested* herself. Witnesses such as police and Army investigators and Defendant's boss testified as to her lack of cooperation with the police during the investigation of her husband's murder; the prosecutor's closing argument likewise referred to her reaction to invoke her right to counsel when Sergeant Diamond was arrested. None of these situations was custodial such that her Fifth and Sixth Amendment rights to counsel and to remain silent would have attached. *See Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); *Kirby v. Illinois*, 406 U.S. 682, 688, 32 L. Ed. 2d 411, 417 (1972 (plurality)); *State v. Phipps*, 331 N.C. 427, 441, 418 S.E.2d 178, 185 (1992).

None of the four cases cited by Defendant nor those found by this Court in its review of this argument have awarded a defendant a new trial on the basis of references at trial to the defendant's right to remain silent and right to counsel prior to being arrested or to being in custodial interrogation. *See also Jenkins v. Anderson*, 447 U.S. 231, 238, 65 L. Ed. 2d 86, 94-95 (1980) ("We conclude that the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility."); *State v. Lane*, 301 N.C. 382, 384-85, 271 S.E.2d 273, 275 (1980) (distinguishing between impermissible references to the decision to remain silent after arrest and allowable references to silence prior to arrest). We decline to do so now. We hold that this assignment of error is without merit.

VIII.

[12] Defendant next contends she is entitled to a new trial because the trial court made nine improper negative comments before the jury that belittled her trial counsel, and also improperly denied her motion for a mistrial based on this conduct. We disagree.

"In evaluating whether a judge's comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized." *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995); *see also State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985); *State v. Allen*, 283 N.C. 354, 358-59, 196 S.E.2d 256, 259 (1973). Furthermore, "[e]ven if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice." *State v. Staley*, 292 N.C. 160, 165, 232 S.E.2d 680, 684 (1977). A judge must remain impartial towards defense

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counsel and should “refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant’s behalf.” *State v. Wright*, 172 N.C. App. 464, 469, 616 S.E.2d 366, 369 (quoting *State v. Coleman*, 65 N.C. App. 23, 29, 308 S.E.2d 742, 746 (1983), *cert. denied*, 311 N.C. 404, 319 S.E.2d 275 (1984)), *aff’d per curiam*, 360 N.C. 80, 621 S.E.2d 874 (2005).

Nevertheless, “unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.” *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950). This burden to show prejudice “rests upon the defendant to show that the remarks of the trial judge deprived him of a fair trial.” *State v. Waters*, 87 N.C. App. 502, 504, 361 S.E.2d 416, 417 (1987).

In the instant case, after carefully reviewing in context the nine comments complained of by Defendant,⁷ we find that none rise to the

7. The nine comments objected to by Defendant, with some parenthetical relevant context, were as follows:

- (1) “[L]et’s move on to something reasonable, please.” (Defense counsel questioned a forensic technician for the Fayetteville Police Department as to whether her watch was coordinated with the watch at the department and, if not, how far off it might be.)
- (2) “Well, that makes it an unfair question then.” (Defense counsel questioned the forensic technician about blood testing that she did not conduct.)
- (3) “That’s an unfair question.” (Defense counsel questioned a Fayetteville Police detective as to whether a signature was that of Defendant.)
- (4) “[Y]ou know that’s not appropriate.” (Defense counsel continued asking the same question after an objection by the State had twice been sustained by the trial court.)
- (5) “You know that’s inappropriate, please, sir.” (Defense counsel made a statement in front of the jury in response to a sustained objection, then continued and finished the statement over an additional sustained objection.)
- (6) “Let’s not make any gratuitous remarks.” (Defense counsel made a statement about not knowing a witness before the trial, during the State’s redirect examination of that witness.)
- (7) “That’s not a proper question for the jury. Specifically prohibited by the rules of evidence.” (Defense counsel asked an agent with the U.S. Army Criminal Investigations Division whether she had noticed anything about interviewees being untruthful when they made statements to her.)
- (8) “Don’t do that again.” (The State objected, after defense counsel used a third redirect examination to ask a witness the same questions and make the same points that had been made on the previous redirecsts.)
- (9) “So that’s a mischaracter—misstatement . . . Do you acknowledge that?” (Defense counsel asked a defense witness if she had been threatened with prosecution in the case, suggesting that it was the trial court who had done so.)

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level seen in any of the cases cited by Defendant in which a new trial was ordered. *See, e.g., Staley*, 292 N.C. at 165, 232 S.E.2d at 684 (finding prejudice and ordering a new trial where the trial judge had made comments to the jury including, “‘Ladies and gentlemen if these witnesses are not telling the truth, then the court, *I think it is obvious what the facts are. Now, I have made your speech again for you.*’”); (emphasis in original)); *Wright*, 172 N.C. App. at 464-65, 616 S.E.2d at 367 (finding prejudice and ordering a new trial where trial judge mocked defense counsel in front of jury on several occasions and made comments such as, “‘I have done everything I can possibly do, except end your cross examination. . . . Whatever you need to do, as I have now told you three times, whatever you need to do to help yourself not do that, do it.’”).

Rather, as in *Larrimore* and *State v. Agnew*, the trial court’s statements in this case “reflected efforts on the part of the trial judge to maintain progress and proper decorum in what was evidently a prolonged and tedious trial.” *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808 (quoting *State v. Agnew*, 294 N.C. 382, 395, 241 S.E.2d 684, 692, *cert. denied*, 439 U.S. 830, 58 L. Ed. 2d 124 (1978)). In a ten-week trial with over 6,300 pages of transcript, we find that the nine comments by which the trial court admonished Defendant’s counsel when he asked inappropriate or improper questions did not prejudice Defendant nor deprive her of a fair trial. Accordingly, we find no merit to this assignment of error.

IX.

[13] Defendant also contends that she is entitled to a new trial because the prosecutor’s closing argument was *ex mero motu* error, such that the trial court should have intervened. We disagree.

In cases where a defendant does not object at trial to the prosecutor’s closing arguments, “the impropriety of the argument must be gross indeed in order for [an appellate court] to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.” *State v. Hoffman*, 349 N.C. 167, 185, 505 S.E.2d 80, 91 (1998) (internal quotations and citations omitted), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999). Additionally, our Supreme Court has repeatedly held that “counsel must be allowed wide latitude in the argument of hotly contested cases.” *State v. Berry*, 356 N.C. 490, 518, 573 S.E.2d 132, 150 (2002) (citation and quotations omitted).

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Here, after carefully reviewing the entirety of the prosecutor's closing argument to the jury, we find that none of the comments challenged by Defendant were so grossly improper as to require the *ex mero motu* intervention by the trial court. Defendant specifically objects to the prosecutor's statements (1) that Defendant had "a burden there once they put on evidence and you can reject it or you can accept it"; (2) concerning Captain Theer's character and his mother; (3) assuring the jury that "[e]verything I argued to you is supported by the facts in this case"; and, (4) referring to occasions on which Defendant had lied.

We note that the prosecutor also explicitly said in his closing argument, "The defendant doesn't have to prove anything. The state has the burden of proof. We have the burden of proof. We put on evidence." In a criminal case, "the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." *State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994). The prosecutor's reference here to Defendant's "burden" was not grossly improper when it followed a clear statement of the State's burden of proof in the case, and was instead designed to suggest to the jury that Defendant had failed to contradict the State's evidence.

Furthermore, the prosecutor's passing references to Captain Theer's character and to his mother "did not improperly emphasize sympathy or pity for the victim's family." *State v. Alford*, 339 N.C. 562, 572, 453 S.E.2d 512, 517 (1995). Moreover, when "[v]iewed in the context of his entire argument, these comments did not attempt to make sympathy for the victim or his family the focus of the jury's deliberation." *Id.* As such, they were not improper. A prosecutor is similarly permitted to give reasons why the jury should believe the State's evidence or not believe a witness, and the prosecutor's comments here did not rise to the level of gross impropriety that would have warranted *ex mero motu* intervention by the trial court. See *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 464-65 (1994), sentence vacated, 346 N.C. 253, 485 S.E.2d 290 (1997); *State v. McKenna*, 289 N.C. 668, 687, 224 S.E.2d 537, 550, sentence vacated, 429 U.S. 912, 50 L. Ed. 2d 278 (1976).

This assignment of error is therefore without merit.

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X.

[14] Next, Defendant argues she is entitled to a new trial because the trial court erroneously admitted the State's evidence about computer documents related to body bags, specifically, concerning alleged searches on the website eBay for "body bag disaster pouches" stored in the memory of Defendant's home computer. Defendant asserts that the evidence was irrelevant and inadmissible under Rules of Evidence 401-403 and 901, as well as the Fourteenth Amendment to the Constitution.⁸

In its ruling on Defendant's motion to exclude the evidence, the trial court noted that it had "reviewed eight boxes of computer records which have now been represented to be an approximately 21,000 documents." He further stated,

It was a rare occurrence that a document could be interpreted as having been produced by a third party. The computers were found in a locale at least in the constructive possession of the defendant. The State always has the burden of showing relevancy and attributions to the defendant which the Court will have to judge as to its admissibility as offered.

At trial, after overruling the defense objection to the evidence in question, the trial court instructed the jury that

this evidence concerning with this issue dealing with the body bag is offered and received concerning the defendant's then existing state of mind or emotion such as intent, plan, motive or design. It's offered and received for that limited purpose and your consideration thereof.

Even assuming *arguendo* that the admission of this testimony was error and an abuse of the trial court's discretion, we find that it was not prejudicial to Defendant. See N.C. Gen. Stat. § 14-1443(a) (prejudice results where, "had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). The evidence referring to the body bags comprised just three documents out of the 21,000 reviewed by the trial court, and out of over five hundred exhibits submitted by the State. The trial court made findings that the computer was in the

8. Although Defendant's brief refers to the Fourteenth Amendment as grounds for finding this evidence to have been inadmissible, she offers no argument to support the constitutional grounds. We therefore consider only her evidentiary claims, under an abuse of discretion standard. See N.C. R. App. P. 28(b)(6).

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constructive possession of Defendant, and defense counsel cross-examined the State's computer expert as to whether Captain Theer could perhaps have conducted the searches rather than Defendant.

In light of the other overwhelming evidence presented to the jury as to Defendant's guilt, we conclude that this evidence, even if irrelevant, was not so prejudicial as to have affected the outcome of the trial. This assignment of error is without merit.

XI.

[15] Lastly, Defendant argues that her conviction for first-degree murder should be vacated because the short-form indictment was insufficient. As recognized by Defendant in her brief, however, our courts have previously rejected the argument she makes, and this issue was raised and decided against Defendant at trial. *See State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, cert. denied, 539 U.S. 985, 156 L. Ed. 2d 702 (2003). This assignment of error is accordingly dismissed.

Conclusion

For the foregoing reasons, we conclude that Defendant's trial was free of prejudicial error. We therefore uphold her convictions for first-degree murder and conspiracy to commit first-degree murder.

No prejudicial error.

Judges BRYANT and STEPHENS concur.

IN RE L.T.R. AND J.M.R., MINOR CHILDREN

No. COA06-296

(Filed 16 January 2007)

1. Child Abuse and Neglect— abuse—serious physical injury—bruise

The trial court did not err in a child abuse and neglect case by concluding that the four-year-old minor child's dark six-inch bruise on his right thigh which lasted well over one week was a serious physical injury by other than accidental means within the meaning of N.C.G.S. § 7B-101(1) because: (1) neither the statute

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nor case law requires that the injured child receive medical attention to sustain a determination that the injury is serious; (2) ample evidence established that the minor child received the bruise from a severe blow delivered by respondent stepfather with a brush, and a doctor testified that it would have taken considerable force to cause such a bruise; and (3) although the evidence is silent as to the nature and amount of pain the minor child may have experienced when the blow was delivered, the child was still experiencing sufficient discomfort to utter “ow” several days later while rolling around on a bed watching cartoons.

2. Child Abuse and Neglect— neglect—findings of fact

The trial court did not err by concluding the juveniles were neglected as defined by N.C.G.S. § 7B-101(15) in that the minor children do not receive proper care, supervision, or discipline from respondent mother and stepfather, and live in an environment injurious to their welfare, because: (1) a parent’s conduct in a neglect determination must be viewed on a case-by-case basis considering the totality of the evidence; and (2) all of the findings, and not simply the finding of fact regarding the “thumping” game that left a bruise on one child’s face, show that the children’s physical, mental, and emotional well-being was, at a minimum, at substantial risk of being impaired based on improper care.

3. Child Abuse and Neglect— best interests of child—custody awarded to father

The trial court did not abuse its discretion in a child abuse and neglect case by determining that a return to respondent mother’s home was not in the best interests of the two minor children, because given the evidence establishing abuse and neglect in this case, the trial court’s decision to award custody of the children to their father, to limit respondent mother’s visits with the children by requiring them to be supervised, and to prohibit any contact between the children and respondent stepfather, was the result of a reasoned decision guided by the best interests of the juveniles.

4. Child Abuse and Neglect— findings of fact—clear, cogent, and convincing evidence

The trial court did not err in a child abuse and neglect case by its findings on adjudication and disposition, because: (1) although respondent stepfather challenges finding of fact 7 based

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on the fact that it incorrectly states the birth month of the two minor children, these errors are immaterial to the court's adjudication decision; (2) although respondent stepfather challenges finding of fact 11, the Court of Appeals has already addressed the ample evidence finding that respondent struck one of the minor children with a brush; (3) with respect to finding of fact 12 in the adjudication order and finding of fact 8 in the disposition order, there was no evidence which would suggest or prove that the minor child's biological father caused the bruise on the back of the child's right thigh; (4) with respect to finding of fact 15, the mother admitted the minor child sustained a bruise on her face after a "thumping" game, and findings of fact which are supported by competent evidence are conclusive on appeal even in the face of conflicting evidence; (5) with respect to finding of fact 20, DSS records were admitted into evidence at the adjudication and disposition hearings, and included a report that case planning and family preservation services were offered to the family at three intervals; (6) in regard to the finding of fact about the minor child's bathing routine, respondent father gave his implied consent to this evidence by failing to object to the evidence when it was offered; and (7) although respondent contends the findings of fact in the adjudication and disposition orders are really conclusions of law, all but two of the challenged findings are statutorily required to be included, and the two remaining conclusions are supported by clear, cogent, and convincing evidence.

Appeal by Respondents from orders entered 17 June 2005 and 28 June 2005 by Judges Monica H. Leslie and Bradley B. Letts in Haywood County District Court. Heard in the Court of Appeals 31 October 2006.

Haywood County Department of Social Services, by Ira L. Dove, for Petitioner-Appellee.

Michael E. Casterline for Respondent-Mother.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Keischa M. Lovelace and Duncan B. McCormick, for Respondent-Stepfather.

STEPHENS, Judge.

Respondents-Appellants ("Respondents") are the biological mother and the stepfather of the minor children, L.T.R. and J.M.R.

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Respondents appeal the 17 June 2005 order of Judge Leslie adjudicating L.T.R. as abused and neglected, and J.M.R. as neglected. They also appeal the 28 June 2005 disposition order of Judge Letts granting custody of both children to their biological father. For the reasons discussed herein, we affirm the trial court's determinations.

The evidence tended to show that after a report was made to the Haywood County Department of Social Services ("DSS"), Allison Holmes, an investigator, observed a six-inch bruise on L.T.R.'s right thigh on 31 October 2004. She took pictures and asked L.T.R. about the bruise. L.T.R., who was almost four years old at the time, reported that Respondent Stepfather hit him with a brush. When Ms. Holmes asked the child why he had been hit, he responded that he "gets in trouble a lot." He told Ms. Holmes that he was frightened of his stepfather. Ms. Holmes also observed a bruise on the face of J.M.R., who reported that she received the bruise after falling in the bathtub. Ms. Holmes, however, believed the bruise looked like a fingerprint. J.M.R., who was five years old at the time, told Ms. Holmes that Respondent Stepfather "call[ed] [L.T.R.] stupid and yell[ed] at [L.T.R.]"

The biological father of the children testified that L.T.R. did not want to tell him about the bruise, but did so after being prompted by J.M.R. He said he became angry upon observing the bruise because the bruise was "a little too big of a bruise to see on a kid and not get irate." He further testified that he heard Respondent Mother tell L.T.R. on the phone to say that the bruise was the result of falling in the bathtub.

Lucy McFarland, a social worker and investigator with DSS, testified that Respondent Mother and Respondent Stepfather "adamantly denied that they had left a bruise on [L.T.R.]" Respondent Mother stated that J.M.R.'s bruised face was a result of a "thumping game." On 5 November 2004, Ms. McFarland took L.T.R. to Dr. Stephen Wall for a medical examination.

Dr. Wall, stipulated as an expert in pediatrics and the diagnosis and treatment of child abuse, examined L.T.R. and observed a faint bruise about six inches long over his right posterior upper thigh. He testified that L.T.R. told him that Respondent Stepfather hit him on the leg with a purple brush. Dr. Wall reviewed the photographs of the bruise that were taken by Ms. Holmes and opined that the bruise was "[a]t least several days old" when the photographs were made. He testified further that it was "[v]ery unlikely" that L.T.R.'s bruise was the

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result of a fall in the bathtub. Regarding the amount of force it would take to cause such a bruise, Dr. Wall stated: "I would say that's considerable force to use on a child of that age to leave a bruise like that. And I would call it quite inappropriate." Elaborating, he likened the amount of force necessary to cause such a bruise to "someone [falling] from a pretty considerable height with great velocity . . . like an eight foot fall onto an edge[.]"

Respondent Mother testified that she did not see the bruise on L.T.R. until a social worker told her about it. She further testified that L.T.R. told her he "got" the bruise when he slipped and fell in the bathtub. Respondent Mother denied that she instructed L.T.R. on how to explain the bruise. However, Catherine Scott, the social worker who supervised visits between the children and Respondent Mother, testified that L.T.R. told her Respondent Mother had called Respondent Stepfather on the phone during a visit, and both of them told L.T.R. to say that he had fallen on a plastic toy boat in the bathtub and caused the injury. L.T.R. told Ms. Scott that Respondent Stepfather promised him a "big wheel" if he said that he had fallen on a boat. L.T.R. also told Ms. Scott, however, that Respondent Stepfather had hit him with a brush.

At the conclusion of the adjudication hearing, the trial court found and concluded that L.T.R. was an abused and neglected juvenile and that J.M.R. was a neglected juvenile. At the subsequent disposition hearing, Ms. Scott, on behalf of DSS, recommended that custody of L.T.R. and J.M.R. be given to the biological father. At the conclusion of the disposition hearing, the trial court ordered that Respondent Stepfather have no contact with the juveniles and that the biological father have custody of the children, with weekly supervised visitation by Respondent Mother. From the adjudication and disposition orders, Respondents appeal.

Respondent Mother brings forward three arguments to challenge the trial court's orders. Respondent Stepfather presents six arguments for our review,¹ three of which are identical to Respondent Mother's contentions. We therefore review and resolve these arguments together.

[1] Respondents first argue that "spanking" which does not result in serious physical injury is not abuse or neglect as a matter of law.

1. By motion filed 8 June 2006, Respondent Stepfather moved to withdraw one of his arguments from consideration on this appeal. That motion is hereby allowed.

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Specifically, they assert that since the bruise on L.T.R.'s leg was temporary, faded away, and did not cause permanent scarring, the evidence is insufficient to sustain the trial court's determination that L.T.R. was abused or neglected. They argue further that there is no evidence the bruise L.T.R. received caused great pain and suffering, a requirement to sustain felony child abuse convictions under our criminal code. *See State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). To support their position, Respondents rely on *Scott v. Scott*, 157 N.C. App. 382, 579 S.E.2d 431 (2003) (holding trial court did not err in finding that evidence of a spanking with a belt which left no more than temporary red marks and required no medical attention did not establish abuse of the child), and *In re Mickle*, 84 N.C. App. 559, 353 S.E.2d 232 (1987) (holding evidence did not sustain an abuse finding where child was whipped once with a belt and another time with a switch, sustaining temporary marks and bruising each time). We are unpersuaded by Respondents' arguments.

In determining whether a child is neglected or abused, the trial court must make sufficient findings of fact to support its conclusions of law. *In re Ellis*, 135 N.C. App. 338, 520 S.E.2d 118 (1999). Furthermore, "findings of fact by the trial court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983) (citations omitted), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984). An abused juvenile is one whose parent or guardian:

- a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
- b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
- c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior[.]

N.C. Gen. Stat. § 7B-101(1) (2005). Section 7B-101 does not define "serious physical injury." However, this Court has recently considered what constitutes serious physical injury for purposes of felony child abuse charges in *State v. Romero*, 164 N.C. App. 169, 595 S.E.2d 208 (2004). We find the reasoning in *Romero* instructive here.

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In *Romero*, we held that evidence that the defendant hit his one-year-old son at least once with a belt, that the child began to cry after being hit, and that the child suffered a visible bruise to his forehead as a result of being hit was sufficient to prove a serious physical injury and, therefore, to support the defendant's conviction of felony child abuse. This Court was not persuaded by defendant's argument that the child's bruise was not a serious injury because it was small and there was no evidence of the nature of the injury and degree of pain associated with the injury. Noting that neither the statute nor case law requires that the injured child receive immediate medical attention to sustain a determination that the injury is serious, this Court reasoned that whether an injury is serious is generally a question for the jury "because the nature of an injury is dependant [sic] upon the relative facts of each case[.]" *Id.* at 172, 595 S.E.2d at 211 (citations omitted).

For this reason, we find Respondents' reliance on *Scott v. Scott, supra*, unpersuasive.² The child in *Scott* was old enough to be in school and to have been suspended from school for fighting. He was old enough to have challenged his mother's authority by physical and verbal intimidation and mature enough to manipulate the estranged relationship between his parents to his favor. By contrast, L.T.R. had not yet reached his fourth birthday when the "spanking" at issue occurred. Instead of temporary red marks, L.T.R. had a dark, six-inch bruise, which lasted well over one week, on his right thigh. Ample convincing evidence established that L.T.R. received the bruise from a severe blow delivered by Respondent Stepfather with a brush. Moreover, although the evidence is silent as to the nature and amount of pain L.T.R. may have experienced when the blow was delivered, the child was still experiencing sufficient discomfort to utter "Ow" several days later while rolling around on a bed watching cartoons. Given the description of the bruise when it was discovered "[a]t least" several days later, the fact that L.T.R. experienced dis-

2. *Mickle, supra*, also fails to provide support for Respondents' position because it was decided under a statute (section 7A-517(1)) which is no longer in effect. That statute specifically required "a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ" to prove abuse of a juvenile. *See N.C. Gen. Stat. § 7A-517(1)* (Repealed by S.L. 1998-202). Given this statutory definition, the *Mickle* Court held that only "injuries permanent in their effect" would sustain a determination of abuse. *Mickle*, 84 N.C. App. at 560, 353 S.E.2d at 233. By contrast, Chapter 7B defines abuse for purposes of juvenile cases as the infliction of "serious physical injury[.]" N.C. Gen. Stat. § 7B-101(1). Neither the statute nor case law decided under this statute has imposed a requirement that the injury alleged to constitute abuse be permanent in nature.

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comfort at that time from simply playing on a bed, and Dr. Wall's testimony that it would have taken "considerable force" to cause such a bruise, it strains reason and credulity to suggest, as Respondents do, that the infliction of this injury on this little boy cannot constitute abuse as a matter of law, because there is no direct evidence of "great pain or suffering."

We agree with the *Romero* decision that the nature of an injury is dependent upon the facts of each case and, based on the evidence before us in this case, we reject Respondents' derogation of the nature of the injury suffered by L.T.R. We hold that the evidence is sufficient to sustain the trial court's determination that L.T.R. "is an abused juvenile, as defined by N.C.G.S. 7B-101(1), in that the Respondent mother . . . and stepfather . . . inflicted or allowed to be inflicted upon the juvenile a serious physical injury by other than accidental means."

[2] By their next assignments of error, Respondents argue that the evidence was insufficient to support the trial court's determination that the juveniles "are neglected juveniles, as defined by N.C.G.S. 7b-101(15), in that the minor children do not receive proper care, supervision or discipline from Respondent mother . . . and step-father . . . and live in an environment injurious to their welfare." In particular, Respondents take issue with the court's finding of fact that the fingertip-shaped bruise on J.M.R.'s face "was caused by the Respondent mother playing a thumping or flicking game with the five-year old child, causing bruising[.]" They argue that this finding of fact is inadequate to support the trial court's conclusion that the minor children were neglected. Again, we disagree with Respondents' position.

Section 7B-101(15) of the Juvenile Code defines a neglected child as one

who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2005). Relying on *In re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 (2003), Respondents argue that in order to adjudicate a child neglected, there must be some physical, mental, or

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emotional impairment as a consequence of the failure to provide proper care, supervision or discipline. In fact, the *Stumbo* Court recognized that, to sustain a finding of neglect in juvenile cases, our appellate courts have consistently required that there be either evidence of physical, mental or emotional impairment, “*or a substantial risk of such impairment* as a consequence of the failure to provide “proper care, supervision, or discipline.” ” *Id.* at 283, 582 S.E.2d at 258 (citations omitted) (emphasis added); *see also In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) (citation omitted) (holding that “[w]here there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding”). Conceding that the “‘thumping game’ may not have been prudent,” Respondents nevertheless contend that engaging in such a “game,” even when it produced bruising of the child’s face, is insufficient as a matter of law, under the *Stumbo* test, to establish neglect.

We first note that a parent’s conduct in a neglect determination must be viewed on a case-by-case basis considering the totality of the evidence. *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001), *reh’g denied*, 355 N.C. 224, 560 S.E.2d 138, *cert. denied*, 536 U.S. 923, 153 L. Ed. 2d 778 (2002). Second, we note that the *Stumbo* Court held the evidence before it to be insufficient as a matter of law to support a neglect determination because the *only* evidence presented in *Stumbo* was an anonymous caller’s one-time observation of the two-year-old child naked and unsupervised in the driveway. As Justice Orr, writing for the majority, pointed out, there was no evidence of how long the child had been in the driveway, “the character of the surrounding area[,]” or whether the child had ever been naked outside unsupervised on any other occasion. *Stumbo*, 357 N.C. at 282, 582 S.E.2d at 258.

By contrast, in the case *sub judice*, the evidence before the trial court included (a) Respondent Mother’s admission to “thumping” her five-year-old daughter in the face hard enough with her finger to leave a bruise shaped like her finger, as part of an ongoing “game”; (b) the bruising of L.T.R.’s upper leg from a severe blow delivered by his step-father with a brush; (c) Respondents’ effort to convince L.T.R. to lie about what happened to cause the bruise on his leg, including promising him a substantial gift in exchange for lying; (d) the fact that J.M.R. told the social worker that the bruise on her face came from falling in the bathtub, the same lie Respondents tried to exact from L.T.R., whereas Respondent Mother admitted that the bruise resulted from

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her “thumping” J.M.R. in the face; and (e) Respondent Mother’s admission that she left L.T.R. alone in the bathtub every night for twenty to thirty minutes after “turn[ing] the water on for him, mak[ing] sure it was the right temperature and let[ting] him have at it.” The trial court made detailed findings of fact based on this evidence. All these findings, not simply the finding of fact regarding the “thumping” game, show that the children’s physical, mental and emotional well-being was, at a minimum, at substantial risk of being impaired because of improper care. *See Padgett*, 156 N.C. App. at 649, 577 S.E.2d at 340. We conclude that the trial court did not err in adjudicating both children as neglected juveniles because neither “receive[d] proper care, supervision or discipline from [their] mother . . . and stepfather . . . and live[d] in an environment injurious to their welfare.” These assignments of error are overruled.

[3] Respondents’ third argument is that the trial court abused its discretion in determining that a return to Respondent Mother’s home was not in the best interests of L.T.R. and J.M.R. Respondents also contest the court’s order that visits between the children and Respondent Mother be supervised, and that there be no contact between Respondent Stepfather and the children. They rely on their arguments that the evidence is insufficient as a matter of law to support abuse and neglect of L.T.R. and neglect of J.M.R. As we have rejected Respondents’ arguments on these issues, we overrule their assignments of error related to the trial court’s 28 June 2005 order on disposition. We hold that, given the evidence establishing abuse and neglect in this case, the trial court’s decision to award custody of the children to their father, to limit Respondent Mother’s visits with the children by requiring them to be supervised, and to prohibit any contact between the children and Respondent Stepfather, was plainly the result of a reasoned decision guided by the clear best interests of these juveniles.³ *See* N.C. Gen. Stat. § 7B-1110(a) (2005); *In re C.D.A.W.*, 175 N.C. App. 680, 625 S.E.2d 139 (2006).

3. We also note that, at disposition, the trial court took judicial notice of the separate juvenile case regarding L.R.P., the half-sibling of L.T.R. and J.M.R. Respondents are L.R.P.’s biological parents. By adjudication and disposition orders entered by Judge Letts on 28 June 2005 and 15 July 2005, respectively, L.R.P. was determined to be an abused, neglected and dependent juvenile after Respondent Stepfather was arrested for driving while intoxicated and driving with a revoked license on 5 March 2005. That day, Respondent Stepfather was in the vehicle with Respondent Mother, who had also been drinking alcohol. An eighteen-month-old L.R.P. was also in the vehicle. By these actions, Respondents violated a previous 16 December 2004 order which mandated them to not have L.R.P. around alcohol.

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[4] We turn now to an examination of the additional arguments brought forward by Respondent Stepfather. By multiple assignments of error, Respondent Stepfather (1) contests a number of the trial court's findings on adjudication and disposition as not being supported by clear, cogent and convincing evidence; (2) challenges the court's adjudicatory finding related to L.T.R.'s bath time routine as being outside the scope of the juvenile petition alleging neglect; and (3) contends the court erred in denominating certain conclusions of law as findings of fact.

In an adjudication of abuse and neglect, the trial court's findings of fact which are supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. *In re A.B.*, 179 N.C. App. 605, 635 S.E.2d 11 (2006). The adjudicatory findings of fact at issue are as follows:

7. That these matters involve [L.R.P.], born the 6th day of June 2003^[4]; [L.T.R.], born the 3rd day of November 2000; and, [J.M.R.], born the 11th day of February 1999.

....

11. That [Respondent Stepfather] hit [L.T.R.] with a brush causing this bruise. The force to cause such bruising was so considerable that the bruise was visible at least eight days after the incident when Dr. Steven [sic] Wall examined the child on the 5th day of November 2004.

12. That the bruise on [L.T.R.] was caused by [Respondent Stepfather] during the week of October 25, 2004 to October 29, 2004 while the child was in the custody of Respondent mother [] and stepfather [].

....

15. That also on the 31st day of October 2004 Social Worker Holmes observed a fingertip-shaped bruise on the face of [J.M.R.]. This bruise was caused by the Respondent mother playing a thumping or flicking game with the five-year old child, causing bruising to [J.M.R.].

....

4. L.R.P. is the half-sibling of L.T.R. and J.M.R. The juvenile case involving L.R.P. is not at issue in this appeal.

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20. That at the time of the filing of petitions in these matters the Haywood County Department of Social Services had made the following reasonable efforts to prevent or eliminate the need for placement of the juveniles: family preservation services on at least four separate occasions; medical exam of [L.T.R.]; protection plan with Respondent mother and stepfather.

The disputed finding of fact in the order on disposition is:

8. That regarding the events related to the abuse and neglect of these children and in the presence of the children by [Respondent Stepfather], the abuse and neglect was not caused or in any way related to any actions by the [biological] father in this matter[.]

Respondent Stepfather challenges Finding of Fact 7 because it incorrectly states the birth month of J.M.R. and L.R.P. As Petitioner DSS correctly points out, these errors are immaterial to the court's adjudication decision. This argument is wholly lacking in merit and is rejected.

As for Respondent Stepfather's challenge to Finding of Fact 11, we have previously addressed the ample convincing evidence that supports the trial court's finding that Respondent Stepfather struck L.T.R. with a brush. The trial court heard evidence from the biological father, and DSS investigators Holmes and Scott, who testified L.T.R. consistently reported to them that the bruise on his leg was caused by being hit with a brush by Respondent Stepfather. Dr. Wall, to whom L.T.R. also reported that his stepfather hit him with a brush, testified that the injury was consistent with being forcefully struck with an object. This is clear, cogent and convincing evidence to support this contested finding of fact. In addition, with respect to Finding of Fact 12 in the adjudication order and Finding of Fact 8 in the disposition order, Respondent Stepfather argues that clear, cogent and convincing evidence does not exclude the biological father as a "potential cause" of the bruise. This argument, too, wholly lacks merit inasmuch as there is not a shred of evidence which would even suggest, much less prove, that L.T.R.'s father caused the bruise on the back of his right thigh. On the contrary, all the evidence establishes that the bruise was already several days old by the time the biological father discovered it, and that it resulted from the severe blow delivered to L.T.R.'s leg by Respondent Stepfather. We hold that these disputed findings are supported by sufficient evidence.

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Turning to Respondent Stepfather's challenge to Finding of Fact 15, the evidence supporting this finding includes Ms. Holmes's testimony that she observed a fingerprint bruise on the face of J.M.R. on 31 October 2004, and the testimony of Ms. McFarland that Respondent Mother told her the bruise was caused by a "thumping game" wherein the children were struck in the face by the other family members. Respondent Stepfather argues this evidence is insufficient to support this finding of fact because J.M.R. told the social worker she sustained the bruise when she fell. We disagree. The clear and convincing evidence to support this finding of fact was provided by Ms. McFarland, who testified unequivocally that when she asked how J.M.R. sustained the bruise on her face, J.M.R.'s mother replied, "it was that thumping." We note again that findings of fact of the trial court which are supported by competent evidence are conclusive on appeal, even in the face of conflicting evidence. *In re Norris, supra.*

As for Respondent Stepfather's argument that Finding of Fact 20 was erroneously entered, we note first that the DSS records were admitted into evidence at the adjudication and disposition hearings. The records included a court report, dated 9 June 2005, which stated that case planning and family preservation services were offered to the family at three intervals from February to August 2003, January to April 2004, and November 2004 to May 2005. Additional documentation revealed family preservation services from March 2002 to June 2002. Plainly, there was plenary evidence before the court to support this finding of fact.

Respondent Stepfather additionally argues, however, that Finding of Fact 20 was erroneously included in the adjudication order because the trial court did not dictate this finding in open court, and because the DSS attorney who drafted the written order was limited by the judge to drafting jurisdictional findings. Because this finding is unnecessary to the trial court's determination that the minor children were abused and/or neglected, it is unnecessary for us to address this argument.

Respondent Stepfather next argues that the trial court erred in making findings of fact regarding L.T.R.'s bathing routine. Specifically, he argues that because the juvenile petition filed by DSS did not contain allegations regarding L.T.R.'s bathing routine and allege that activity as a basis for neglect of L.T.R., the finding of fact and conclusion of law regarding the bathing routine were erroneously entered because they were outside the scope of the petition. We disagree.

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“The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition.” N.C. Gen. Stat. § 7B-802 (2005). In this case, the petition stated in an attachment that “[t]he Respondent mother and her husband maintain that the bruise on [L.T.R.] is from the child slipping in the bathtub. Therefore, [L.T.R.] was residing in the home of his mother and stepfather when this bruising occurred.” Petitioner contends that this paragraph put Respondents on notice that this issue may arise at trial.

Further, the Rules of Civil Procedure are applicable to Chapter 7B proceedings. *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004). Rule 8 requires that a pleading contain “[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief[.]” N.C. Gen. Stat. § 1A-1, Rule 8 (2005). Under the liberal standard of notice pleading, a claim is adequate if it gives sufficient notice of the events that produced the claim to enable the adverse party to understand the complaint’s nature and basis and to file a responsive pleading. *Ripellino v. N.C. Sch. Bds. Ass’n*, 176 N.C. App. 443, 627 S.E.2d 225 (2006).

Respondent Stepfather did not testify at the adjudicatory hearing. However, his wife, mother of the children, clearly defended the allegations against her and her husband by offering evidence that L.T.R. sustained the bruise on his right leg from falling in the bathtub. Indeed, on *direct* examination, Respondent Mother was asked to describe her bathing “procedure” for L.T.R., and she then explained his nightly bath routine as follows:

I would turn the water on for him, make sure it was the right temperature and let him have at it. He would play and he would rough house in there. He would have a good time and he would splash the water around and we would go about our business cooking dinner just playing around with the other kids and then he would yell out after about 20 or 30 minutes, “I’m ready to get out.” And then I would go in there and I would make sure his hair was washed. Because he was three years old at the time[.]

Respondent Mother then identified and offered into evidence a plastic toy boat that she contended was responsible for the bruise on her son’s leg. All of this evidence was elicited without objection by Respondent Stepfather.

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Rule 15(b) of the North Carolina Rules of Civil Procedure provides that “[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” N.C. Gen. Stat. § 1A-1, Rule 15(b) (2005). In the present case, Respondent Stepfather gave his implied consent by failing to object to the evidence when it was offered. In *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 683, 340 S.E.2d 755, 759 (citations omitted), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986), this Court held that “a party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary.” Accordingly, we hold that Respondent Stepfather impliedly consented to the adjudication of this issue before the trial court, and the trial court did not err in making findings of fact and conclusions of law on the evidence thus presented. This assignment of error is overruled.

Finally, Respondent Stepfather argues that the trial court erred in making findings of fact in the adjudication and disposition orders that are really conclusions of law. All but two of the findings of fact challenged by these assignments of error are statutorily required to be included in the trial court’s adjudication and disposition orders. See N.C. Gen. Stat. §§ 7B-507(a)(1)-(a)(2); 7B-807 (2005). The two disputed findings of fact not statutorily required (that L.T.R. is an abused juvenile, and that both L.T.R. and J.M.R. are neglected juveniles) are not only supported by clear, cogent and convincing evidence as previously addressed, but are also properly recited as conclusions of law. This argument has no merit.

In conclusion, we hold that the trial court did not err in either the adjudicatory or disposition orders finding and concluding that L.T.R. was neglected and abused and that J.M.R. was neglected. The orders appealed from are thus

Affirmed.

Judges WYNN and HUDSON concur.

The judges concurred prior to 31 December 2006.

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STATE OF NORTH CAROLINA v. DENNIS MARSHALL CLEMMONS

No. COA05-1643

(Filed 16 January 2007)

1. Jury— challenge for cause—failure to make futile effort to challenge juror

The trial court did not abuse its discretion in a first-degree felony murder case by refusing to excuse two prospective jurors for cause, because: (1) a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice, and it is insufficient for defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception; (2) during the process, defendant never challenged the twelfth juror or indicated that he would have used a peremptory challenge to excuse him if he had any peremptory challenges remaining; (3) although it is clear that defendant sought to have a peremptory challenge restored prior to passing on the twelfth juror, there is nothing in the record to indicate that he would have used that restored challenge to excuse that juror, and thus, defendant cannot show he was forced to seat a juror whom he did not want based on exhaustion of his peremptory challenges; and (4) assuming arguendo the trial court abused its discretion, any such error was without prejudice.

2. Evidence— prior crimes or bad acts—character for violence—failure to make offer of proof

The trial court did not err in a first-degree felony murder case by refusing to admit the cross-examination testimony of defendant's girlfriend (also the victim's daughter) regarding specific instances of violent threats by the victim against two other individuals, because: (1) defendant made no offer of proof concerning the proposed testimony, thus leaving the Court of Appeals to only speculate as to what the witness might have said; (2) the significance of the proposed testimony was not obvious from the record; and (3) the witness's testimony in no way indicated that defendant was aware of previous confrontations between the victim and men who mistreated the witness, so it was unclear whether the proposed testimony would have bolstered defendant's claim that he was reasonably afraid of the victim.

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3. Appeal and Error— preservation of issues—failure to argue

The remaining assignments of error that defendant failed to argue are deemed abandoned under N.C. R. App. P. 28(b)(6).

Judge HUDSON dissenting.

Appeal by defendant from judgment entered 5 May 2005 by Judge Steve A. Balog in Harnett County Superior Court. Heard in the Court of Appeals 20 September 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Francis W. Crawley, for the State.

Marshall Dayan for defendant-appellant.

CALABRIA, Judge.

Dennis Marshall Clemons (“defendant”) appeals from a judgment entered upon a jury verdict finding him guilty of first degree felony-murder. We find no error.

At trial in Harnett County Superior Court, Sonya Spears (“Spears”) testified that she arrived home on the afternoon of 2 March 2004 and began arguing with her boyfriend, defendant, in the street. During the argument, defendant struck Spears in the head with a brick. Spears went to her uncle’s home and telephoned her father, Thurman Allen (“the victim”), asking him to pick her up. Spears then returned and continued arguing with defendant, who snatched a necklace from her neck.

When the victim arrived, Spears and Danielle Clemons (“Danielle”) got into his pickup truck. Danielle is Spears’ cousin and defendant’s niece. The victim asked Spears who hit her, but she refused to identify her attacker. “[D]ad, let’s just go, I don’t want no trouble around here, I don’t want you to get in no trouble, so let’s just go,” she stated. The victim asked defendant and his brother, Herbert (“Herbert”), whether they had hit Spears. They both answered no and defendant suggested the victim ask Spears.

The victim then started to get out of the truck, and Spears grabbed a shotgun that the victim carried on the floorboard of his truck. Defendant took out a handgun and began firing it at the victim, hitting him in the head, arm, hand, and hip. The medical examiner concluded that the victim died as a result of the gunshot to his hip,

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which severed his aorta and inferior vena cava and caused severe internal bleeding.

Defendant testified that he had retrieved the handgun from his brother's mobile home after Spears told him the victim was coming to pick her up. Defendant had experienced prior confrontations with the victim in which the victim had warned him not to hit Spears. Further, defendant was aware that the victim once pulled a handgun on Cedric McCall ("McCall"), who was arguing with Spears, and another time came over with a shotgun to confront Herbert, who was then dating Spears.

Defendant stated that these encounters made him afraid the victim would attack him, prompting him to arm himself with a handgun. Defendant testified that he shot the victim in self-defense when the victim started to get out of his truck with the shotgun and continued firing when the victim got out of the truck and aimed the shotgun at defendant. Danielle's testimony tended to support defendant's version of events, as she stated that she saw the victim clutching the shotgun and chambering a shell before he fell to the ground. She stated that after the victim had fallen, defendant retrieved the victim's wallet and took the money. Defendant was arrested and charged with first degree murder and robbery with a dangerous weapon.

Following the trial, the jury returned a verdict finding defendant guilty of first degree felony-murder. Upon that verdict, Judge Steve A. Balog entered judgment, sentencing defendant to life imprisonment without parole. From that judgment, defendant appeals.

[1] On appeal, defendant initially argues that the trial court erred by refusing to excuse two prospective jurors for cause. He contends that the court's denial of his challenges for cause denied him the right to a trial by an impartial jury as guaranteed by the United States and North Carolina Constitutions, but because defendant did not raise these constitutional arguments before the trial court, we will not consider them on appeal. *State v. Smith*, 359 N.C. 199, 208-09 607 S.E.2d 607, 615 (2005). However, defendant also argues that the trial court abused its discretion in denying the challenges for cause and we conclude that defendant has preserved his right to bring forward this assignment of error pursuant to N.C.G.S. § 15A-1214(h) (2005).

During jury selection, a party may challenge a potential juror for cause on the ground that he is unable to render a fair and impartial verdict. N.C. Gen. Stat. § 15A-1212(9) (2005). *Id.* North Carolina

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General Statute § 15A-1214 provides the “statutory method for preserving a defendant’s right to seek appellate relief when a trial court refuses to allow a challenge for cause . . . and is the only method by which such rulings may be preserved for appellate review.” *State v. Morgan*, 359 N.C. 131, 148, 604 S.E.2d 886, 897 (2004) (citation and quotation marks omitted).

North Carolina General Statute § 15A-1214(h) (2005) sets forth the method by which a defendant may seek reversal of a conviction where his juror challenges for cause were denied. That statute states in relevant part:

(h) In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

(i) A party who has exhausted his peremptory challenges may move orally or in writing to renew a challenge for cause previously denied if the party either:

- (1) Had peremptorily challenged the juror; or
- (2) States in the motion that he would have challenged that juror peremptorily had his challenges not been exhausted.

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

Id.

Our courts have interpreted this statute as follows:

Where the court has refused to stand aside a juror challenged for cause, and the party has then peremptorily challenged him, in order to get the benefit of his exception he must exhaust his remaining peremptory challenges, and then challenge another

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juror peremptorily to show his dissatisfaction with the jury, and except to the refusal of the court to allow it.

State v. Watson, 310 N.C. 384, 396, 312 S.E.2d 448, 456 (1984) (citations omitted). This interpretation was recently affirmed in *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005). In that case, the Court noted that the defendant could not gain reversal of his conviction even if he demonstrated that the trial court abused its discretion in denying his juror challenges for cause because he failed to signal his dissatisfaction at the jury's composition by lodging unsuccessful challenges. *Id.* at 704-05, 617 S.E.2d at 38.

Based on the above statute and case law, it is clear that a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice. It is insufficient for a defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception. “[A] defendant, in order to preserve his exception to the court’s denial of a challenge for cause, must (1) exhaust his peremptory challenges and (2) thereafter assert his right to challenge peremptorily an additional juror.” *State v. Allred*, 275 N.C. 554, 563, 169 S.E.2d 833, 838 (1969) (emphasis added). “The purpose for challenging the additional juror is to establish prejudice by showing that appellant was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges.” *State v. Hartman*, 344 N.C. 445, 459-60, 476 S.E.2d 328, 336 (1996).

Here, defendant initially challenged jurors McFarland and Byrd for cause and was denied. Defendant then used two of his six peremptory challenges to excuse McFarland and Byrd and subsequently exhausted all remaining peremptory challenges. After eleven jurors were seated, defendant in an off-the-record bench conference renewed his challenges for cause and his motion was again denied by the court. Defendant then passed on the twelfth juror without objection.

During this process, the defendant never challenged the twelfth juror or indicated that he would have used a peremptory challenge to excuse him if he had any peremptory challenges remaining. The process was summarized in the following exchange:

THE COURT: . . . The defendant had renewed motions here at the bench with regard to jurors about which he had moved to excuse

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for cause, and had been denied by the court. I believe that took place at a point in time after we had 11 jurors?

MR. REECE: That's correct, Your Honor.

THE COURT: And when the defendant—when the attorneys approached the bench, that was the subject matter here at the bench. The motion was renewed at a point in time where the defendant had used six peremptory challenges after a previous challenge for cause had been denied, and here at the bench renewed the motion to excuse those folks for cause. And that motion was denied, and is now documented on the record.

And then that occurred again when we were in selection for the alternate juror. Again, the defendant approached the bench, with opposing counsel, and moved to renew the challenge for cause on the jurors that the court had denied the challenge for cause, and that motion was renewed and challenge for cause was also denied. At which point in each case the defendant being without further peremptory challenges, and accepted the final juror on the original 12 and the alternate juror. Does that accurately reflect what occurred with the jury?

MR. REECE: Yes, sir, I believe it does.

THE COURT: Anything else you'd like to add?

MR. REECE: No, sir, I think that's an accurate statement.

Although it is clear that the defendant sought to have a peremptory challenge restored prior to passing on the twelfth juror, there is nothing in the record to indicate that he would have used that restored challenge to excuse that juror. As such, defendant cannot "show[] that [he] was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges." This fact defeats the defendant's claim of prejudice. Thus, assuming *arguendo* that the trial court abused its discretion by denying the defendant's challenges of jurors McFarland and Byrd for cause, any such error amounted to error without prejudice. Accordingly, this assignment of error is overruled.

[2] Defendant next argues the trial court erred by refusing to admit the cross-examination testimony of Spears regarding specific instances of violent threats by the victim against McCall and Herbert. We disagree.

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As a general rule, evidence of a victim's character is not admissible. The rule, however, has exceptions. An accused, for example, may introduce evidence of a pertinent trait of character of the victim that is relevant to an issue in the case. Where an accused argues that he acted under self-defense, the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor.

State v. Watson, 338 N.C. 168, 187, 449 S.E.2d 694, 705-06 (1994). (citations and quotation marks omitted).

However, a defendant who is denied the opportunity to present evidence of a victim's character trait must take certain steps to preserve the issue for appellate review.

In order to preserve the exclusion of evidence for appellate review, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. The reason for such a rule is that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred. In the absence of an adequate offer of proof, we can only speculate as to what the witness' answer would have been.

State v. Barton, 335 N.C. 741, 749, 441 S.E.2d 306, 310-11 (1994) (internal citations and quotation marks omitted).

The relevant exchange in the record is set forth as follows:

[DEFENDANT'S COUNSEL]: . . . Did your father ever confront [McCall] about the way he treated you?

[Spears]: Cedric, yes, he had.

[DEFENDANT'S COUNSEL]: In fact, he pulled a shotgun on him, did he not?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENDANT'S COUNSEL]: You had a relationship with Herbert Clemmons?

[SPEARS]: Yes, I did.

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[DEFENDANT'S COUNSEL]: That's [defendant]'s brother?

[SPEARS]: Yes, it was.

[DEFENDANT'S COUNSEL]: There came a time where you called your father because you didn't like the way Herbert was treating you?

[SPEARS]: Correct.

[DEFENDANT'S COUNSEL]: Your father came and confronted Herbert about it?

[SPEARS]: Correct.

[DEFENDANT'S COUNSEL]: Pulled a gun on him?

[PROSECUTOR]: Object.

THE COURT: Sustained.

Since defendant made no offer of proof concerning Spears' proposed testimony, this Court can only speculate as to what she might have said. The significance of the proposed testimony is not obvious from the record, which provides no guidance as to the subject matter of Spears' testimony or its relevance to defendant's claim of self-defense. Spears' testimony in no way indicates that defendant was aware of previous confrontations between the victim and men who mistreated Spears, so it is unclear whether Spears' proposed testimony could have bolstered defendant's claim that he was reasonably afraid of the victim. Because no offer of proof was made, we cannot know whether Spears would have answered that the victim had in fact pulled a gun on McCall and Herbert. Thus, there is no indication that defendant could have used the evidence to establish the victim's character for violence and demonstrate that the victim was the initial aggressor. Accordingly, this issue is not properly preserved for appellate review. Further, defendant's arguments relating to alleged constitutional violations were not preserved by timely objection at the trial court and will thus not be considered on appeal.

[3] Defendant has failed to argue his remaining assignments of error on appeal, and they are thus deemed abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006). ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

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No error.

Judge HUNTER concurs.

Judge HUDSON dissents in a separate opinion.

The Judges participated in this decision and submitted this opinion for filing prior to 1 January 2007.

HUDSON, Judge, dissenting.

The majority concludes that defendant has not preserved the issue of whether the trial court abused its discretion in denying his challenges for cause to two veniremembers. Because I believe that defendant has preserved his right to bring forward this assignment of error pursuant to N.C. Gen. Stat. § 15A-1214(h) (2004), I respectfully dissent.

During jury selection, a party may challenge a potential juror for cause on the ground that he is unable to render a fair and improper verdict. N.C. Gen. Stat. § 15A-1212(9) (2004). N.C. Gen. Stat. § 15A-1214 provides the “statutory method for preserving a defendant’s right to seek appellate relief when a trial court refuses to allow a challenge for cause . . . and is the only method by which such rulings may be preserved for appellate review.” *State v. Morgan*, 359 N.C. 131, 148, 604 S.E.2d 886, 896 (2004). N.C. Gen. Stat. § 15A-1214(h) states that:

In order for a defendant to seek reversal of the case on appeal on the ground that the judge refused to allow a challenge made for cause, he must have:

- (1) Exhausted the peremptory challenges available to him;
- (2) Renewed his challenge as provided in subsection (i) of this section; and
- (3) Had his renewal motion denied as to the juror in question.

Id. Subsection (i) states that a party who has exhausted his peremptory challenges may move to renew a challenge for cause previously denied if the party had peremptorily challenged the juror or states in a motion that he would have done so if his challenges had not been exhausted. *Id.* Here, I conclude that defendant complied with N.C.

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Gen. Stat. § 1214: he moved to excuse prospective jurors McFarland and Byrd for cause, he employed peremptory challenges to remove both from the jury after the court denied his motions for cause, he exhausted the peremptory challenges available to him, and he renewed his motions for cause as to the jurors in question, which motions the court denied.

“[I]n addition to preserving error, defendant must show error by (1) demonstrating that the trial court abused its discretion in denying the challenge, and (2) showing defendant was prejudiced by this abuse of discretion.” *State v. Smith*, 359 N.C. 199, 206, 607 S.E.2d 607, 614 (2005), citing *State v. Grooms*, 353 N.C. 50, 68, 540 S.E.2d 713, 725 (2000), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54, 122 S. Ct. 93 (2001). In order to show prejudice, in addition to complying with the procedures of N.C. Gen. Stat. § 15A-1214, defendant must also have challenged an additional juror after exhausting his peremptory challenges. *State v. Hartman*, 344 N.C. 445, 459-60, 476 S.E.2d 328, 336 (1996). In some cases, our courts have referred to this challenge to an additional juror as requesting “an additional peremptory challenge.” *State v. Call*, 349 N.C. 382, 402, 508 S.E.2d 496, 509 (1998). N.C. Gen. Stat. § 15A-1214(i) states that after a party moves to renew a challenge for cause previously denied:

The judge may reconsider his denial of the challenge for cause, reconsidering facts and arguments previously adduced or taking cognizance of additional facts and arguments presented. If upon reconsideration the judge determines that the juror should have been excused for cause, he must allow the party an additional peremptory challenge.

Id. However, the official commentary refers to this as the “restoration of a previously used challenge . . . an attempt to exercise the peremptory challenge which the party asserts should be restored to him.” *Id.* Thus, if the court grants the renewed motion for cause as to a juror previously peremptorily removed, the peremptory challenge that had been used to eliminate that juror would be restored. Indeed, although the trial court has authority “to restore a peremptory challenge . . . [it] ha[s] no authority to provide defendant with additional peremptory challenges.” *State v. Smith*, 359 N.C. at 207-08, 607 S.E.2d at 615. I conclude that whether the party refers to this challenge to an additional juror as a renewed challenge for cause or a request for an “additional” peremptory is inconsequential: if the court grants the renewed challenge for cause, it will restore a peremptory challenge to

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defendant. The essence of the requirement is that defendant “show[] that [he] was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges.” *State v. Hartman*, 344 N.C. at 459-60, 476 S.E.2d at 336.

Here, after the court denied defendant’s motions to excuse prospective jurors McFarland and Byrd for cause, defendant exercised peremptory challenges to remove McFarland and Byrd. Defendant also exercised four additional peremptory challenges, thus exhausting the six peremptory challenges allowed by N.C. Gen. Stat. § 15A-1217(b)(1) (2004). After eleven jurors were seated and defendant had exhausted all of his peremptory challenges, defense counsel approached the bench during voir dire of the twelfth juror, Mr. Leggett. Following an off-the-record bench conference, defendant passed on Mr. Leggett, who had a pending DWI charge and whose mother had been a crime victim. At the conclusion of jury selection, the court stated that there were matters that needed to go on the record outside the presence of the jury and stated for the record that after eleven jurors were seated

defendant had renewed motions here at the bench with regard to jurors about which he had moved to excuse for cause, and had been denied by the court . . . The motion was renewed at a point in time where the defendant had used six peremptory challenges after a previous challenge for cause had been denied, and here at the bench renew the motion to excuse those folks for cause. And that motion was denied, and is now documented on the record. . . . *At which point . . . the defendant being without further peremptory challenges . . . accepted the final juror on the original 12.*

(Emphasis added). The clear implication of this excerpt is that defendant only accepted the twelfth juror because he had no more challenges. I thus conclude that defendant has adequately shown that he “was forced to seat a juror whom he did not want because of the exhaustion of his peremptory challenges.” *Hartman*, 344 N.C. at 460, 476 S.E.2d at 336.

Further, I would conclude that the court abused its discretion in denying defendant’s motions for cause and would remand for a new trial. It is well-established that we review the trial court’s decision to deny a challenge for cause for abuse of discretion. *See, e.g., State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977). During voir dire, prospective juror McFarland revealed that he had served as a police

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officer for eleven years and had worked with some of the officers who were witnesses in this case. The prosecutor asked him if he would “be able to listen to the testimony of law enforcement officers with the same test of credibility as any witness that would testify,” to which McFarland replied that “it would be difficult. All I can say is that this is my first time. I’d give it my best shot.” During defense counsel’s voir dire examination of McFarland, the following exchange took place:

Q: . . . would it be fair to say that you already had leanings or inclinations with respect to criminal cases where law enforcement is involved?

A: I just felt like that—although I’m not employed, *per se*, with the police now . . . I guess symbolically I feel like I’m part . . . of the team or some loyalty to it simply because I had worked with a lot of the guys and gone through some of this. That’s basically what I feel.

Q: Sure. Let me ask you this. You indicated that with respect to the testimony of the law enforcement officers, you’d believe what they said?

A: Yes, sir.

Q: That’s because the position that they occupy and because of your own personal feelings as part of a team or whatever?

A: Yes, sir.

Q: Okay. And that’s as we sit here before you’ve even heard any testimony or heard any cross examination of any of the evidence?

A: I’m sorry?

Q: And you feel that way now before you’ve even heard anyone, any law enforcement officer testify, or anybody testify?

A: Well, it’s the first time I’ve been on a jury, so all of it’s new to me. But I’d do the best I can to be impartial and objective. Although it would be, like I stated before, it would be difficult in having worked with some of these guys that are here today.

* * *

Q: But as you’re sitting there, you indicated that you already have some feelings about the testimony of law enforcement in this case?

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A: Right.

Q: Okay. You feel like you're part of that team, so to speak?

A: Right.

Q: Would it be fair to say that, you know, that you might be leaning one way or the other just as we sit here without knowing anything else about it, not hearing anything, but that you might be leaning one way or the other in the case?

A: Well, I think when he called out the list of potential witnesses, and told—given the opportunity to—names of persons who I'm familiar with, such as Kenny Lee, Sergeant Jaggers, so forth, I think that persons I dealt with in law enforcement, I worked beside— . . . I think if they're on the stand that I would believe what they're saying, their testimony, based on my experience with those particular officers on the list.

* * *

Q: It would be difficult for you to set aside what you know about those officers already and base your verdict just on what you heard here, wouldn't you agree with me on that?

A: It would be difficult, but, again, having my first time, I'm more than willing to do my best and try to be objective.

Q: Sure. And I know you would try to be fair.

A: Right.

Q: But would you agree with me that it would be difficult for you to view these peoples' testimony through the same lens that you would view people you don't know—

A: I would agree that it probably would be difficult for any law enforcement officer in my position to come up here and do that, so it would put me in the same boat with them, yes.

Q: You feel like that might substantially impair your ability to be fair and impartial during this trial?

A: I stated before that I felt that it would be a problem, but, again, I'm willing to give it my best shot and listen to all testimony.

Q: Well, let me back up again and ask you again, or maybe a little different way, and I know you're trying to be fair. I know you want to be fair. You understand why I'm concerned?

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A: Oh, absolutely.

Q: And you understand that try as you might, that if it turned out you weren't able to view it impartially, it's really too late at that point?

A: Uh-huh.

Q: Do you feel like the fact that you already know some of these officers, the fact that you have indicated you don't think you could view their testimony quite the same as you could people you don't know—

A: I stated that I would believe them.

Q: Sure. Sure. And I didn't phrase it that way. I was trying to be a little more delicate. In fact you believe them, without hearing anything.

A: Right.

In *State v. Lee*, the North Carolina Supreme Court held that the trial court abused its discretion in failing to excuse a prospective juror for cause who had been married to a police officer for eleven years, had been on friendly terms and socialized with officers who worked with her husband, and who initially stated that she would tend to lend more credibility to the testimony of police officers than to the testimony of strangers. 292 N.C. 617, 234 S.E.2d 574. In *Lee*, the following exchanges occurred between defense counsel and the prospective juror and between the trial judge and the prospective juror:

Q. I ask you, Mrs. Norvell, since you know Mr. Moore and Tom Smith and your husband is on the Wilson Police Department, if they should testify in this case, would you tend to put more weight on what they said about the case than some witness you had never seen before?

A. I don't think so.

Q. But, you are not sure about that?

A. No, sir.

Q. It is possible that you might believe what they said more than somebody you didn't know.

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A. I would have a tendency to.

Mr. Daughridge: If the Court please, we would challenge her for cause.

Court: Let me ask you one or two things myself. I don't think anybody can make a positive statement as to who they would believe until they heard what they had to say. Do you have some genuine concern in your own mind that you might be swayed because of your husband's employment?

A. No, sir.

Court: Do you feel you could be fair and impartial and give to the defendant's testimony or that of his witnesses the same weight you would give to somebody else?

A. Yes, sir.

Court: I don't think you have established enough.

Q. But, I did understand you to say that knowing Mr. Moore and Mr. Smith, you might tend to believe them more than somebody you don't know at all?

Objection by Mr. Brown.

Overruled.

A. It's hard for me to say.

* * *

Q. I asked you do you feel that there is a genuine possibility by reason of your knowledge of Mr. Moore and Mr. Smith, that you might believe their testimony in this case more so than some witness who you had never seen before?

A. I don't think there's a genuine possibility.

Q. Well, is there a possibility, Mrs. Norvell?

A. There might be.

Id. at 576-77, 234 S.E.2d at 619-21.

In holding that the trial court erred, the Court noted that although "a juror's close relationship with a police officer, standing alone, is not grounds for a challenge for cause," because juror Norvell was a

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police officer's wife and had been friendly with members of the police force, she "was subject to strong influences which ran counter to defendant's right to a trial by an impartial jury." *Id.* at 579, 234 S.E.2d at 625. The Court further noted that "Norvell initially stated that she would have a tendency to lend more credibility to the testimony of the police officers than to a stranger," and that she only stated that she could be impartial in response to a direct question by the trial judge. *Id.* Here, McFarland stated that he felt like he was part of the law enforcement team and repeatedly indicated that he would believe law enforcement officers based on his prior experiences with the officers and his feelings of loyalty to the law enforcement team. Although McFarland stated that he would do his best, he never indicated that he actually could be impartial. The State argues that our appellate courts have upheld the trial court's refusal to excuse jurors who stated that they would lend more credence to testimony of law enforcement officers. *State v. McKinnon*, 328 N.C. 668, 675-78, 403 S.E.2d 474, 478-79 (1991); *State v. Lynch*, 300 N.C. 534, 548, 268 S.E.2d 161, 169 (1980). However, in these cases there was no significant relationship between the prospective jurors and law enforcement, and more importantly, in each of these cases the prospective juror affirmed his or her ability to remain impartial. *McKinnon* at 675-78, 403 S.E.2d at 478-79, *Lynch* at 548, 268 S.E.2d at 169. McFarland's stated loyalty to the law enforcement team of which he had been a part for eleven years, his repeated statements that he would believe the officers' testimony before hearing it, and his failure to state that he could remain impartial lead me to conclude that "under the particular circumstances of this case," prospective juror McFarland could not "qualify as a disinterested and impartial juror." *Lee*, 292 N.C. at 625, 234 S.E.2d at 579. Thus, I would hold that the trial court abused its discretion in refusing to grant defendant's challenge for cause as to McFarland and that defendant is entitled to a new trial.

Because I would grant defendant a new trial, I would not address defendant's argument regarding prospective juror Byrd or his other assignment of error.

IN THE COURT OF APPEALS

407

N.C. FARM BUREAU MUT. INS. CO. v. ARMWOOD

[181 N.C. App. 407 (2007)]

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., PLAINTIFF
v. TERRY DAVIS ARMWOOD, JR., TERRY DAVIS ARMWOOD, SR., INDIVIDUALLY
AND AS PARENT AND GUARDIAN FOR TERRY DAVIS ARMWOOD, JR., RAMONA ARMWOOD,
INDIVIDUALLY AND AS PARENT AND GUARDIAN FOR TERRY DAVIS ARMWOOD, JR., JIMMY
LEE BEST, AND STELLA H. BOSTIC, DEFENDANTS

No. COA06-176

(Filed 16 January 2007)

Insurance— not-for-hire commercial vehicle—minimum amounts—read into policy

The provisions of N.C.G.S. § 20-309(a1) are inserted into every insurance policy issued for not-for-hire commercial vehicles. The trial court here did not err by granting summary judgment against the insurer in an action involving an injury suffered by a child as he left a church bus, so that the policy was reformed to include that statutory minimum coverage of \$750,000.00.

Judge HUNTER dissenting.

Appeal by plaintiff from judgment entered 13 July 2005 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 20 September 2006.

Young, Moore & Henderson P.A., by R. Michael Strickland and Glenn C. Raynor, for plaintiff-appellant.

Law Offices of Frank A. Cassiano, by John K. Bramble and Frank A. Cassiano, for defendants-appellees.

CALABRIA, Judge.

North Carolina Farm Bureau Mutual Insurance Company, Inc. (“Farm Bureau”) appeals from an order granting summary judgment entered in favor of defendants on the issue of the minimum amount of liability coverage required in an insurance policy for a not-for-hire commercial vehicle. We affirm.

On 7 October 2001, eight-year-old Terry Davis Armwood, Jr. (“T.J.”) was injured when he was struck by a vehicle after exiting a 1974, 30-passenger bus owned and operated by Jimmy Lee Best (“Best”) and insured by a policy issued by Farm Bureau. Best purchased the policy on 4 June 2001 from Stella Bostic (“Bostic”). When Bostic sold the policy to Best, she offered liability amounts providing \$750,000.00 in coverage per accident with \$5,000.00 for medical pay-

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ments per accident and Uninsured/Underinsured Motorist Coverage of \$750,000.00. When Best refused the amounts offered, Bostic crossed through the original liability amounts and changed the policy limits to \$50,000/\$100,000/\$25,000 per accident, \$1,000 for medical payments, and Uninsured/Underinsured Motorist Coverage of \$50,000/\$100,000/\$25,000, per Best's request.

After the accident, Terry Davis Armwood, Sr. and Ramona Armwood (collectively "the Armwoods") filed a claim with Farm Bureau on behalf of their son, T.J. Farm Bureau offered to settle the claim for \$50,000.00, the limit of Best's insurance policy. The Armwoods rejected Farm Bureau's settlement offer and demanded damages in excess of the \$50,000.00 policy limit. On 30 October 2003, Farm Bureau filed a declaratory relief action requesting the Wake County Superior Court to determine the scope and amount of coverage provided by Farm Bureau under the policy for any damages caused by the 7 October 2001 accident. Farm Bureau, the Armwoods, and Bostic filed motions for summary judgment. The court granted Bostic's summary judgment motion dismissing all claims against her. The court also granted the Armwoods' summary judgment motion to the extent that the insurance policy was "reformed" to reflect a minimum coverage of \$750,000.00 and denied Farm Bureau's motion for summary judgment. Farm Bureau appeals the order granting summary judgment in favor of the Armwoods and denying Farm Bureau's summary judgment motion. We affirm.

Our standard of review for an order granting summary judgment is *de novo*. *Stafford v. County of Bladen*, 163 N.C. App. 149, 151, 592 S.E.2d 711, 713 (2004), *appeal dismissed by*, 358 N.C. 545, 599 S.E.2d 409 (2004). Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Leake v. Sunbelt, Ltd. of Raleigh*, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287 (1989). "[I]n considering summary judgment motions, we review the record in the light most favorable to the non-movant." *Id.* "When the facts of a case are undisputed, construction and application of an insurance policy's provisions to those facts is a question of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005).

This case presents an issue of first impression: When a passenger bus transports passengers without requiring payment for services, should the insured or the insurer bear the responsibility of including the minimum statutory requirements of N.C. Gen. Stat. § 20-309(a1)

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in the liability policy if the bus is classified as a not-for-hire commercial vehicle?

Farm Bureau contends the owner is responsible for ensuring that liability coverage meets the minimum statutory requirements.¹ Farm Bureau argues that because N.C. Gen. Stat. § 20-309(a1) specifically states that the *owner* shall have financial responsibility, it is on the owner of a vehicle to obtain the appropriate level of liability insurance. The Armwoods contend that Best charged money to transport children in addition to the use of the bus for church purposes and therefore, the mandatory coverage for the bus was the coverage required for a passenger bus for-hire and should have exceeded \$750,000.00.

The basic rule of statutory interpretation is that the intent of the Legislature controls. *Campbell v. First Baptist Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979). This intent may be determined by considering the language of the statute, the spirit of the act, and what the act seeks to accomplish. *Taylor v. Taylor*, 343 N.C. 50, 56, 468 S.E.2d 33, 37 (1996). “The purpose of [The Financial Responsibility Act of 1957] is to assure the protection of liability insurance, or other type[s] of established financial responsibility, up to the minimum amount specified in the act, to persons injured by the negligent operation of a motor vehicle upon the highways of this State.” *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 253, 382 S.E.2d 745, 748 (1989). In order to effectuate the purpose of the Financial Responsibility Act of 1957, “the provisions [of the Act] must be read into insurance policies and [must be] construed liberally.” *Id.*

Section 20-309 of the North Carolina General Statutes addresses the financial responsibility required for registration of vehicles. It reads in pertinent part:

- (a) No motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article. The owner of each motor vehicle registered in this State shall maintain financial responsibility continuously throughout the period of registration.
 - (a1) An owner of a commercial motor vehicle, as defined in G.S. 20-4.01(3d), shall have financial responsibility for the operation

1. Defendants-appellees asserted during oral arguments that Farm Bureau had issued an MCS-90 Form along with Best's insurance policy. However, this issue was not addressed in defendants-appellees' brief and therefore, will not be considered.

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of the motor vehicle in an amount equal to that required for for-hire carriers transporting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9.

N.C. Gen. Stat. § 20-309 (a) and (a1) (2005). Under § 20-309(a), an owner of a vehicle may not register the vehicle unless the owner has an insurance policy or another type of financial responsibility in place that meets the minimum liability coverage as required by § 20-279.1. Our Courts have consistently held that the minimum liability coverage required by § 20-279.1 is “written into every insurance policy as a matter of law.” *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 168, 463 S.E.2d 389, 390-91 (1995); *McCleod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 287, 444 S.E.2d 487, 490 (1994). Thus, even though § 20-309(a) requires the owner to obtain financial responsibility in order to register a vehicle, the owner is not responsible for ensuring that the insurance policy contains the minimum liability coverage imposed by statute. The minimum liability coverage is written into each insurance policy as a matter of law. Similarly, § 20-309(a1) requires the owner of a not-for-hire commercial vehicle to obtain an insurance policy or other financial responsibility in order to register the vehicle. It follows that just as the minimum liability coverage requirements for vehicles registered under § 20-309(a) are written into insurance policies as a matter of law, so too are the minimum liability coverage requirements for not-for-hire commercial vehicles registered under § 20-309(a1). In effect, this does not place a burden on either party to ensure that liability coverage meets the minimum statutory requirements, but it inserts the provisions of § 20-309(a1), as a matter of law, into every insurance policy issued for not-for-hire commercial vehicles. See *Integon*, 342 N.C. at 168, 463 S.E.2d at 390-91; *McCleod*, 115 N.C. App. at 287, 444 S.E.2d at 490. Further, writing the minimum liability coverage into insurance policies for vehicles registered under § 20-309(a1) as a matter of law promotes the main purpose of the Financial Responsibility Act—protecting innocent motorists. See *Pearson*, 325 N.C. at 253, 382 S.E.2d at 748.

Farm Bureau argues that N.C. Gen. Stat. § 62-268, which pertains to for-hire commercial vehicles, specifically provides that liability coverage may be obtained through multiple insurance policies. Farm Bureau further argues that because § 62-268 and § 20-309(a1) pertain to commercial vehicles and the only factor that determines which statute applies is whether the commercial vehicle is used for hire, the two statutes should be construed together. Thus, Farm

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Bureau argues, § 20-309(a1) allows the owner of a not-for-hire commercial vehicle to obtain the required financial responsibility through multiple insurance policies thereby placing the responsibility to ensure that the minimum coverage has been obtained upon the owner. We disagree.

Basic canons of statutory interpretation provide that “[s]tatutes in *pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each” *Faizan v. Insurance Co.*, 254 N.C. 47, 53, 118 S.E.2d 303, 307 (1961). “[A]ll applicable laws on the same subject matter should be construed together so as to produce a harmonious body of legislation, if possible.” *Id.*

Section 20-279.21 is part of the Financial Responsibility Act of 1953, and § 20-309(a1) is part of the Financial Responsibility Act of 1957. Both acts pertain to the same subject matter—the financial responsibility of motorists. Thus, “[t]he two acts are to be construed together so as to harmonize their provisions and to effectuate the purpose of the Legislature.” *Harrelson v. Insurance Co.*, 272 N.C. 603, 610, 158 S.E.2d 812, 818 (1968). See also, *Odum v. Nationwide Mutual Ins. Co.*, 101 N.C. App. 627, 631, 401 S.E.2d 87, 90 (1991) (“The two Acts are complementary and are to be construed in *pari materia* so as to harmonize them and give effect to both.”).

In sharp contrast to Farm Bureau’s argument, § 62-268 is found under chapter 62—a chapter devoted to an entirely different body of law. Chapter 62 regulates public utilities and contains specific provisions for motor carriers. If the Legislature intended for statutes concerning not-for-hire commercial vehicles to be interpreted in conjunction with statutes concerning for-hire vehicles, it could have included the statutes in the same chapter or referenced the provisions of § 62-268.

Therefore, because § 20-279.21 and § 20-309 have an identical purpose—protecting the innocent from irresponsible drivers—it is proper that these statutes are interpreted in a consistent manner in order to give effect to the intent and purpose of the Legislature. Construing these statutes in *pari materia*, we hold that just as provisions of N.C. Gen. Stat. § 20-279.21 are read into every insurance policy as a matter of law, provisions of N.C. Gen. Stat. § 20-309(a1) are also read into every insurance policy as a matter of law. This is to effectuate the purpose of the Financial Responsibility Act—protect-

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ing the innocent from irresponsible motorists. *See Pearson*, 325 N.C. at 253, 382 S.E.2d at 748.

We have considered Farm Bureau's remaining arguments and determined they are without merit. The trial court properly granted the Armwoods' summary judgment motion to the extent that it reformed the insurance policy to include the amount of minimum coverage required by § 20-309(a1), and it properly denied Farm Bureau's summary judgment motion. For the reasons stated herein, we affirm the order of the trial court.

Affirmed.

Judges HUDSON concurs.

Judge HUNTER dissents in a separate opinion.

The Judges participated in this decision and submitted it for filing prior to 1 January 2007.

HUNTER, Judge, dissenting.

Because I disagree with the majority's holding that provisions of N.C. Gen. Stat. § 20-309(a1) should be read into every liability insurance policy on commercial vehicles as a matter of law, I respectfully dissent.

Best purchased a thirty-passenger bus for use in transporting members of his church. In June 2001, he went to plaintiff, an insurer, for liability insurance on the vehicle and was offered an application for a policy containing \$750,000.00 in coverage, which he declined. Best then selected the amount of coverage himself—\$50,000.00 per person and \$100,000.00 per accident—and plaintiff issued a policy in those amounts. Best paid the premiums for the policy and was covered by it in October 2001, when he was involved in the accident at the root of this case in which Terry Armwood, Jr., was injured. Plaintiff sought a declaratory injunction from the trial court that the policy provided coverage of \$50,000.00 per person and \$100,000.00 per accident, as the policy stated on its face. The Armwoods sought a declaration that the policy provided coverage of \$750,000.00. Based on its interpretation of the relevant statutes, the trial court denied plaintiff's motion and concluded that the policy should be reformed to provide coverage of \$750,000.00.

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“The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute[,]” and that purpose “is first ascertained by examining the statute’s plain language.’” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002) (citation omitted). When that language is “‘ ‘clear and unambiguous,’ ’ ” the court is “‘ ‘without power to interpolate, or superimpose, provisions and limitations not contained therein.’ ’ ” *Id.* at 575, 573 S.E.2d at 121 (citations omitted).

In general, insurance policies must be reformed when an applicable statute conflicts with the terms of the insurance policy; at that point, “the provisions of that statute become terms of the policy to the same extent as if they were written in it[.]” *Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 6, 430 S.E.2d 895, 898 (1993). However, our Supreme Court has only reformed policies in cases where an insurer failed to comply with a requirement of the 1953 Act that places a direct burden on the insurer and policy, not the owner. *See, e.g., Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 685-86, 462 S.E.2d 650, 654 (1995) (invalidating family-owned vehicle exclusion to uninsured motorist coverage because section 20-279.21(b) mandated a minimum amount of coverage). “In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of the policy as written.” *Younts v. Insurance Co.*, 281 N.C. 582, 585, 189 S.E.2d 137, 139 (1972).

As discussed below, in this case the terms of the policy do not *conflict* with the statute, because it is not the individual policy that must comply with the minimum requirements but rather the insured’s overall coverage. As such, this Court should measure plaintiff’s liability by the terms of the policy as written. Although such a result might not result in the complete protection of individuals from the risks associated with commercial vehicles, that issue is properly addressed by the legislature, not by this Court.

Two statutes are at issue in this case: the Vehicle Financial Responsibility Act of 1957 (“1957 Act”) and the Financial Responsibility Act of 1953 (“1953 Act”). N.C. Gen. Stat. § 20-309(a1) (2005), part of the 1957 Act, by its plain language puts the onus on *owners* to maintain required liability insurance on their vehicles: “An *owner* of a commercial motor vehicle, as defined in G.S. 20-4.01(3d), shall have financial responsibility for the operation of the motor vehicle in an amount equal to that required for for-hire carriers trans-

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porting nonhazardous property in interstate or foreign commerce in 49 C.F.R. § 387.9.” *Id.* (emphasis added).

The 1953 Act specifically addresses individual policies rather than individual owners. It states that every owner’s policy of liability insurance shall provide the following minimum coverage against loss from liability “for damages arising out of the ownership, maintenance or use” for the covered vehicle: \$30,000.00 for injury or death to one person, \$60,000.00 to two or more persons in one accident, and \$25,000.00 for injury or destruction of property in one accident (\$30/\$60/\$25). N.C. Gen. Stat. § 20-279.21(b)(2) (2005). The plain language of the statute itself actually inserts these specific amounts into every policy as a matter of law.

Because both acts have the same general purpose—namely, protecting the innocent from irresponsible drivers—the two should be read in conjunction, as the majority notes. “Statutes *in pari materia* are to be construed together, and it is a general rule that the courts must harmonize such statutes, if possible, and give effect to each[.]” *Blowing Rock v. Gregorie*, 243 N.C. 364, 371, 90 S.E.2d 898, 904 (1956).

However, the majority’s holding reads the Acts together to create a mandate by the 1953 Act (which explicitly sets out the \$30/\$60/\$25 minimums) that plaintiff’s policy provide coverage in the amount specified by the 1957 Act (\$750,000.00). This controverts the plain language of the two provisions of the 1957 Act at issue. Again, the plain language of N.C. Gen. Stat. § 20-309(a) and (a1) both put the onus on the *owner*. (N.C. Gen. Stat. § 20-309(a) states: “No motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle, as provided in this Article.”) Reading the two Acts in conjunction cannot mean eliminating this plain language by “superimpos[ing]” in the 1957 Act the language of the 1953 Act placing the onus on the insurer.

The trial court itself stated that:

Best, **as the owner** of the 1974 30 passenger bus, a commercial motor vehicle, had the duty and responsibility to obtain the applicable minimum liability coverage for the vehicle. **G.S. 20-309(a1) places the duty to obtain and maintain the appropriate coverage, consistent with the use of the commercial vehicle, on the owner.**

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This conclusion of law explicitly looks to the 1957 Act and places the duty and responsibility for obtaining the correct minimum liability coverage on Best. Despite its own conclusion, however, the trial court then found that plaintiff had a duty to issue the policy for \$750,000.00 and reformed the existing policy to reflect that level of liability. This finding incorrectly holds *plaintiff* responsible for the duty and responsibility the trial court had laid at Best's door.

Further, I see no statutory justification for the majority's holding that we must read a minimum \$750,000.00 clause into this contract. As the majority states, our Courts have consistently held that the minimum coverage required by N.C. Gen. Stat. § 20-279.21(b) (\$30/\$60/\$25) is written into every insurance policy as a matter of law. But note the plain language of this statute:

(b) [Each] owner's policy of liability insurance:

...

- (2) Shall insure the person named therein . . . against loss from the liability imposed by law for damages . . . with respect to each such motor vehicle[] as follows: thirty thousand dollars (\$30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars (\$60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars (\$25,000) because of injury to or destruction of property of others in any one accident[.]

N.C. Gen. Stat. § 20-279.21(b)(2). The statute, unlike N.C. Gen. Stat. § 20-309(a1), specifically addresses an element that every policy must contain. Clearly, legislative intent was that this statute should act to reform any policy that was not in line with these statutory minimums (\$30/\$60/\$25). As mentioned, N.C. Gen. Stat. § 20-309(a1) sets out the minimum liability insurance responsibility of the *owner* of a commercial vehicle. Had the legislature intended this particular provision to reform all policies not in line with the minimums set out for commercial vehicles (\$750,000.00), it could easily have done so by adding to section 20-309(a1) similar construction and language as that used by section 20-279.21(b)(2) requiring all policies to have the \$30/\$60/\$25 minimum. Had the legislature intended this reformation, it could also have simply amended section 20-279.21(b) in the 1953 Act with such

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language, inserting in all commercial vehicle policies the \$750,000.00 minimum requirement. Since the legislature did neither, this Court should not impose such a requirement.

Defendants further argue that the language of N.C. Gen. Stat. § 20-309(b) indicates that only one policy may be used to meet the minimum coverage (“[f]inancial responsibility shall be *a* liability insurance policy . . .” (emphasis added)), agreeing with the trial court’s conclusion that plaintiff’s issuance of a policy below statutory minimums (\$750,000.00) was an “invalid and inappropriate choice[.]” However, the 1953 Act, with which this statute must be read in conjunction, allows a commercial vehicle owner to meet the requirements of liability coverage “by the policies of one or more insurance carriers which policies together meet such requirements.” N.C. Gen. Stat. § 20-279.21(j). Thus, again, the onus is placed on Best, not plaintiff, to obtain the appropriate minimum coverage.

Defendants also argue that, because the Farm Bureau policy did not meet the statutory minimums, Best would not have been able to register his motor vehicle (“[n]o motor vehicle shall be registered in this State unless the owner at the time of registration has financial responsibility for the operation of such motor vehicle”). N.C. Gen. Stat. § 20-309(a). This argument fails because, again, Best could have obtained the statutory minimum of coverage from multiple insurers. The record does not indicate that plaintiff issued a policy that falsely stated the amount of Best’s coverage or inappropriately certified Best for registration purposes; any error in registering the vehicle made by the State cannot be laid at plaintiff’s feet.

In sum, the majority’s holding puts an onus on insurance companies that I do not believe is warranted by the statutes. The plain language of the 1957 Act places on the *owner* the onus for ensuring that minimum statutory requirements for liability insurance are met.

This Court should not disturb the contract between the parties and the motion for summary judgment should have been granted. If the legislature had intended for commercial vehicles to be covered by only one liability insurance policy with a minimum coverage of \$750,000.00, it could easily have done so.

It is important to note that the legislature’s purpose in creating these Acts was clearly to protect the public by having higher mandatory minimum liability insurance coverage for commercial vehicles because the potential for damage to property and individuals is

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higher. However, the legislature addressed that concern by putting the onus for obtaining adequate coverage on the owner. In this particular case, unfortunately, that purpose was not effected, but it is the legislature's provenance to correct this problem; it is not for the courts to impose a correction.

I would reverse the trial court's order partially granting the Armwoods' motion for summary judgment because, based on the applicable statutes comprising the 1953 and 1957 Acts, it was error for the trial court to reform the insurance policy at issue to reflect \$750,000.00 in liability coverage. Further, since Best had no obligation to purchase his entire minimum coverage from one insurer, and plaintiff had no obligation to issue a policy for the statutory minimum, I would reverse and remand the trial court's denial of plaintiff's motion for summary judgment.

STATE OF NORTH CAROLINA v. DEREK SCOTT McQUEEN

No. COA06-203

(Filed 16 January 2007)

1. Motor Vehicles— driving while impaired—requested instruction—testimony of interested witnesses—uniformed police officers

The trial court did not err in a driving while impaired case by failing to give N.C. Pattern Jury Instruction 104.20, testimony of interested witnesses, with respect to the testimony of a uniformed officer who investigated the case because: (1) where officers are in uniform in the performance of their routine duties as in the instant case, our Supreme Court has held that it is improper to single them out as a class of witnesses that may be less credible due to their potential interest in the outcome of the case; and (2) there was no evidence indicating the officer had any particular interest in the case that would cloud his credibility.

2. Sentencing— aggravating factors—failure to submit to jury—harmless error analysis

The trial court committed harmless error in a driving while impaired case by sentencing defendant to an enhanced sentence based on aggravating factors that were not proven to a jury be-

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yond a reasonable doubt, including that the negligent driving of defendant led to an accident causing property damage in excess of \$500 and the negligent driving of defendant led to an accident causing personal injury, because: (1) a common law procedural mechanism existed for submission of aggravating factors to the jury in that North Carolina permits the submission of aggravating factors to a jury using a special verdict; and (2) the overwhelming and uncontroverted testimony at trial was that defendant totaled the victim's car and that one of the occupants of the car was bleeding from her face after the accident and was subsequently treated at the emergency room.

3. Sentencing—range—driving while impaired

The trial court did not err in a driving while impaired case by giving defendant a minimum and maximum sentence, because: (1) contrary to defendant's assertion, *State v. Weaver*, 91 N.C. App. 413 (1988), does not address whether a judge may impose a sentence range for convictions of driving while impaired; and (2) the face of N.C.G.S. § 20-179 provides for a sentencing range.

Appeal by defendant from judgment entered 15 September 2005 by Judge James E. Hardin, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 November 2006.

Roy Cooper, Attorney General, by Patricia A. Duffy, Assistant Attorney General, for the State.

Robert W. Ewing for defendant-appellant.

MARTIN, Chief Judge.

Defendant appeals from a judgment entered upon a jury verdict finding him guilty of driving while impaired in violation of N.C.G.S. § 20-138.1.

The evidence at trial tended to show that on 27 October 2004 at approximately 6:45 p.m., Angela Carter was driving her vehicle in Mecklenburg County, North Carolina. Ms. Carter's fourteen-year-old daughter and ten-year-old son were passengers in the vehicle. As Ms. Carter was about to make a left-hand turn, defendant's vehicle hit the right side of her vehicle, causing it to spin across the street. Ms. Carter's vehicle was heavily damaged and was towed from the scene. The following day, Ms. Carter took her children to the emergency room, where glass was removed from her daughter's head and her cuts were bandaged.

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Officers from the Charlotte-Mecklenburg Police Department responded to the scene of the accident. Officer Webster interviewed defendant and noticed that defendant's eyes were red and glassy and that he smelled of alcohol. Defendant told Officer Webster that he had three beers prior to driving that evening. Officer Webster asked defendant to perform the walk-and-turn field sobriety test. Defendant stepped off the line and turned right instead of left as he had been instructed. Officer Webster then asked defendant to stand on one leg. Defendant was unsuccessful at this second field sobriety test, giving up after twelve seconds. Based on these field sobriety tests, Officer Webster formed a belief that defendant was impaired, arrested him, and took him to the Mecklenburg County Intake Center. An Intoxilyzer test was administered at 9:33 p.m., showing an alcohol concentration of 0.07.

Defendant presented no evidence, and a jury found him guilty of driving while impaired. At the sentencing hearing, the trial court found by a preponderance of the evidence the existence of two aggravating factors: (1) “[t]he negligent driving of the defendant led to an accident causing property damage in excess of \$500.00” and (2) “[t]he negligent driving of the defendant led to an accident causing personal injury,” as well as two mitigating factors. The trial court found the aggravating factors outweighed the mitigating factors and imposed Level Three punishment, sentencing defendant to a minimum term of 45 days and a maximum term of 120 days in prison, which was suspended, and defendant was placed on probation, subject to a condition that he serve three days in jail.

[1] Defendant's first argument on appeal is that the trial court erred in failing to give N.C. Pattern Jury Instruction 104.20, Testimony of Interested Witnesses, with respect to the testimony of Officer Webster. Defendant argues he is entitled to a new trial, citing *State v. Love*, 229 N.C. 99, 47 S.E.2d 712 (1948), *State v. Boynton*, 155 N.C. 456, 71 S.E. 341 (1911), and *State v. Black*, 34 N.C. App. 606, 239 S.E.2d 276 (1977). We conclude these cases are distinguishable from the present case and are inapposite. *Love* and *Boynton* involved plain clothes detectives buying liquor from defendants during prohibition. *Love*, 229 N.C. at 100, 47 S.E.2d at 713; *Boynton*, 155 N.C. at 461, 464, 71 S.E. at 344. *Black* involved an undercover agent buying marijuana from defendant. *Black*, 34 N.C. App. at 608, 239 S.E.2d at 277. These cases focus on the notion that detectives assigned to work undercover to gather evidence about suspected criminal activity of a spe-

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cific nature committed by a defendant may have more of an interest in the outcome of a trial than do other witnesses. *See Love*, 229 N.C. at 103, 47 S.E.2d at 715; *Boynton*, 155 N.C. at 464, 71 S.E. at 344.

Conversely, in situations such as the present case, where the officers were in uniform in the performance of their routine duties, our Supreme Court has held that it is improper to single them out as a class of witnesses that may be less credible due to their potential interest in the outcome of the case. *State v. Hunt*, 345 N.C. 720, 726, 483 S.E.2d 417, 421 (1997); *State v. Williams*, 333 N.C. 719, 733, 430 S.E.2d 888, 895 (1993).

In *Williams*, the Court held that it was not error for the trial court judge to refuse to give a jury instruction that states in pertinent part: “[I]t is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.” *Williams*, 333 N.C. at 732, 430 S.E.2d at 895.

In explaining why the trial court correctly refused to give such an instruction, the Court noted:

The law has recognized that some witnesses, the accomplice and informant, for example, should in some circumstances be the subject of a cautionary instruction when requested. But it would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion. This would be tantamount to saying that police officers are inherently untrustworthy. The cure for unreliable police officers is not to be found in such a shotgun approach.

Id. at 732, 430 S.E.2d at 895 (quoting *Bush v. United States*, 375 F.2d 602, 604 (D.C. Cir. 1967)). The Court went on to state that instructions about the testimony of interested witnesses are proper in certain situations, but only when there is evidence that would “cast doubt upon the truthfulness and objectivity of the witness.” *Id.* at 733, 430 S.E.2d at 895. In the present case, there was no evidence indicating that Officer Webster had any particular interest in the case that would cloud his credibility, and the trial court did not err in refusing to give the requested instruction with regard to his testimony.

[2] Defendant’s second argument on appeal is that the trial court erred by sentencing defendant to an enhanced sentence based on

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aggravating factors that were not proven to a jury beyond a reasonable doubt. We first note that defendant failed to object to this error at the sentencing hearing. Under N.C.R. App. P. 10(b)(1), failure to object at the trial level generally precludes an issue from being reviewed on appeal. This Court, however, has held that “[a]n error at sentencing is not considered an error at trial for the purpose of Rule 10(b)(1) because this rule is ‘directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal.’” *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (quoting *State v. Hargett*, 157 N.C. App. 90, 93, 577 S.E.2d 703, 705 (2003)). Therefore, this issue is properly before this Court. See N.C. Gen. Stat. § 15A-1446(d)(18); *State v. Harris*, 175 N.C. App. 360, 363, 623 S.E.2d 588, 590 (2006); *State v. Canady*, 330 N.C. 398, 401, 410 S.E.2d 875, 878 (1991). Consequently, we turn to the merits of defendant’s argument.

Under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490, 120 S. Ct. at 2362-63, 147 L. Ed. 2d at 455. For purposes of applying *Apprendi*, the U.S. Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), stated:

[T]he relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” and the judge exceeds his proper authority.

Id. at 303-04, 124 S. Ct. at 2537, 147 L. Ed. 2d at 413-14 (citation omitted) (quoting 1 J. Bishop, *Criminal Procedure*, § 87, at 55 (2d ed. 1872)).

In the present case, the court sentenced defendant to a Level Three punishment based upon findings of two aggravating factors and that the aggravating factors substantially outweighed the mitigating factors, without submitting the factors to the jury. Absent a finding of aggravating factors, a defendant convicted of driving while impaired is subject to either Level Four or Level Five punishment, depending

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on whether mitigating factors exist. N.C. Gen. Stat. § 20-179(f). Here the court imposed a more severe Level Three punishment based upon aggravating factors that the court found using a preponderance of the evidence standard. *See* N.C. Gen. Stat. § 20-179(f)(1), (i). This imposition of an aggravated sentence constitutes error under *Blakely* because the defendant received a sentence beyond the statutory maximum based upon aggravating factors that were not found by a jury based upon proof beyond a reasonable doubt.

Pursuant to a case which has subsequently been withdrawn, our Supreme Court has treated errors under *Blakely* as structural errors that are reversible *per se*. *State v. Allen*, 359 N.C. 425, 449, 615 S.E.2d 256, 272 (2005), withdrawn, 360 N.C. 569, 635 S.E.2d 899 (2006). However, in a recent case, *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), the United States Supreme Court held that “[f]ailure to submit a sentencing factor to the jury . . . is not structural error.” *Id.* at 2553, 165 L. Ed. 2d at 477. Thereafter, our Supreme Court has held in *State v. Blackwell*, 361 N.C. 41, — S.E.2d — (2006), that according to *Recuenco*, the failure to submit a sentencing factor to the jury is subject to harmless error review. *Id.* at 44, — S.E.2d at —. The *Recuenco* Court also suggested that if the respondent in the case could have shown a lack of procedure for having a jury determine the applicability of aggravating factors, then the *Blakely* violation in that case would not have been harmless. *Recuenco*, 126 S. Ct. 2550 at 2550, 165 L. Ed. 2d at 471. In order to determine whether the *Blakely* error in this case was harmless, we must first consider whether a procedural mechanism existed at his trial.

In response to the ruling in *Blakely*, the North Carolina General Assembly enacted a procedure for aggravating factors to be proven to a jury under N.C.G.S. § 15A-1340.16. Pursuant to § 15A-1340.10, however, the structured sentencing scheme set out in Article 81B of Chapter 15A does not apply to cases involving a charge of driving while impaired. Instead, sentencing for a conviction of driving while impaired is governed by N.C.G.S. § 20-179. Section 20-179(d) states that “[t]he judge must determine . . . whether any . . . aggravating factors . . . apply to the defendant.” The evidentiary standards on which such a determination is to be made are set out in N.C.G.S. § 20-179(o): “In the sentencing hearing, the State must prove any grossly aggravating or aggravating factor by the greater weight of the evidence” Defendant argues that N.C.G.S. § 20-179 does not provide a procedural mechanism for aggravating factors to be presented to a jury and therefore the *Blakely* error is not harmless.

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The defendant in *Blackwell* also argued that the lack of procedural mechanism for submitting aggravating factors to the jury rendered the *Blakely* error in his case not harmless. In *Blackwell*, however, the lack of procedural mechanism stemmed from the fact that the *Blakely* Act had not been passed at the time of the defendant's trial. Our Supreme Court in *Blackwell* rejected defendant's argument and pointed out its logical shortcoming, noting “[t]here is no meaningful difference between having a procedural mechanism and not using it, and not having a procedural mechanism at all.” *Blackwell*, 361 N.C. at 46, — S.E.2d at —. The Court further wrote: “Moreover, even assuming this language in *Recuenco* was intended to limit the scope of federal harmless error analysis, it is of no practical consequence, as North Carolina law independently permits the submission of aggravating factors to a jury using a special verdict.” *Id.* Having concluded that there is no lack of procedural mechanism, the Court applied harmless error analysis according to *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 47 (1999).

Applying the Court's reasoning in *Blackwell* to the facts in the present case, we conclude that despite the exclusion of a procedural mechanism in the North Carolina General Statutes for the submission of aggravating factors in a charge of driving while impaired, a common law procedural mechanism existed through the use of a special verdict. See *Blackwell*, 361 N.C. at 46-47, — S.E.2d at — (noting that the use of special verdicts in criminal trials “is well-settled under our common law”); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 494 (1973) (“[S]pecial verdicts are permissible in criminal cases.”). Accordingly, we review the *Blakely* error in this case for harmless error according to *Neder*. *Neder* requires this Court to “determine from the record whether the evidence against the defendant was so ‘overwhelming’ and ‘uncontroverted’ that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt.” *Blackwell*, 361 N.C. at 49, — S.E.2d at — (citing *Neder*, 527 U.S. at 9, 119 S. Ct. at 1834, 144 L. Ed. 2d at 47).

In the present case, the aggravating circumstances that the trial court found were: “The negligent driving of the defendant led to an accident causing property damage in excess of \$500”; and “[t]he negligent driving of the defendant led to an accident causing personal injury.” The overwhelming and uncontroverted testimony at trial was that defendant totaled the victim's Toyota Corolla and that one of the occupants of the car was bleeding from her face after the accident and was subsequently treated at the emergency room. Accordingly,

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the error of not submitting the aggravating factors to the jury so that they could be found beyond a reasonable doubt was harmless error, and we uphold the sentence.

[3] Defendant's final argument on appeal is that it was error for the trial judge to give defendant a minimum and maximum sentence for driving while impaired because N.C.G.S. § 20-179 only allows a judge to give defendant an actual sentence, rather than a sentence range. Defendant cites *State v. Weaver*, 91 N.C. App. 413, 371 S.E.2d 759 (1988), in support of this argument. *Weaver*, however, addresses a judge's ability to weigh aggravating factors against mitigating factors and does not address whether a judge may impose a sentence range for convictions of driving while impaired. *Id.* at 417, 371 S.E.2d at 761.

Pursuant to the sentencing statute itself, each level of punishment sets out a sentencing range. For example, N.C.G.S. § 20-179(i) states: "A defendant subject to Level Three punishment . . . shall be sentenced to a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months." Thus, the face of the statute provides for a sentencing range. Therefore, the trial judge does not err when stating both a minimum and maximum sentence.

No error.

Judges TYSON and CALABRIA concur.

AKHTAR MASOOD, EMPLOYEE, PLAINTIFF v. ERWIN OIL COMPANY, EMPLOYER, AND
EMC INSURANCE COMPANIES, CARRIER, DEFENDANTS

No. COA06-322

(Filed 16 January 2007)

**Workers' Compensation—statutory employer—
independent oil company and convenience store—contractor/subcontractor relationship**

Defendant, a wholesale petroleum dealer, was a statutory employer of a convenience store cashier under N.C.G.S. § 97-19 for workers' compensation purposes where defendant had a contractor/subcontractor relationship with the uninsured con-

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venience store owner, and the store owner markets and sells gasoline which defendant is required to do by its contract with the producer (Amoco), notwithstanding defendant and the store owner also have a landlord/tenant relationship.

Judge HUNTER dissenting.

Appeal by plaintiff from opinion and award entered by the North Carolina Industrial Commission on 23 November 2005. Heard in the Court of Appeals 18 October 2006.

Patterson Harkavy, L.L.P., by Leto Copeley, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Phillip J. Anthony and Kathrine Downing Fisher, for defendant-appellee.

HUDSON, Judge.

Plaintiff filed a workers' compensation claim on 23 February 2000 against plaintiff's uninsured employer, Iftikhar Taj Abbasi ("Abbasi"), who does business as Tri-Star Amoco Food Shop ("Tri-Star Amoco"), and against Erwin Oil Company ("Erwin Oil") as a statutory employer pursuant to N.C. Gen. Stat. § 97-19 (2002). The workers' compensation case was stayed while plaintiff proceeded with a tort action against both Abbasi and Erwin Oil. Plaintiff dismissed his workers' compensation and civil claims against Abbasi after reaching a settlement with that employer's general liability insurance carrier. He also dismissed his civil suit against Erwin Oil. Plaintiff's workers' compensation claim against Erwin Oil was heard before the deputy commissioner on 10 September 2003. On 15 April 2004, the deputy commissioner issued an opinion and award finding that N.C. Gen. Stat. § 97-19 did not apply to plaintiff's employment. Plaintiff appealed to the Full Commission, which issued a decision denying plaintiff's claim on 23 November 2005. Plaintiff appeals. We reverse and remand.

The evidence tends to show the following facts. On 6 August 1999, plaintiff was shot in the neck by an armed assailant while working as a cashier for Abbasi at Tri-Star Amoco. Plaintiff sustained serious injury from the shooting. Erwin Oil Company is a "jobber," or wholesaler, of petroleum; Erwin Oil buys gasoline from a producer, such as Amoco, and resells it. Erwin Distributing Corporation owns

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the real estate upon which Tri-Star Amoco is located and it leases that real estate to Erwin Oil. Erwin Oil owns the underground tanks and pumps or equipment connected to those tanks. Abbasi leases the convenience store and equipment from Erwin Oil and operates the store with his own employees. Erwin Oil supplies Abbasi with gasoline on consignment for sale at Tri-Star Amoco and Abbasi receives a commission per gallon of gasoline sold. Abassi's role is known in the industry as a "jobber-dealer." At the time of plaintiff's injury, Erwin Oil had a "jobber contract" with Amoco to purchase gasoline. Most of the gasoline sold by Erwin Oil is distributed to the public through gas station/convenience stores, although Erwin Oil does have some commercial accounts as well.

Plaintiff argues that the Commission erred in finding and concluding that Erwin Oil was not a statutory employer within the meaning of N.C. Gen. Stat. § 97-19. We agree. N.C. Gen. Stat. § 97-19 provides, in pertinent part, that

[a]ny principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate . . . stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits . . . on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

Id. It is undisputed that Abbasi did not have workers' compensation insurance for his employees and that he did not provide such a certificate to Erwin Oil. The Commission found and concluded that Erwin Oil was not a contractor, Abbasi was not a subcontractor, and that N.C. Gen. Stat. § 97-19 did not apply. Whether a defendant is a statutory employer within the meaning of N.C. Gen. Stat. § 97-19 is a jurisdictional matter. *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 309, 392 S.E.2d 758, 759 (1990). We review this issue *de novo*:

Findings of jurisdictional fact made by the Industrial Commission are not conclusive, even when supported by competent evidence. It is incumbent upon this Court to review the evidence of record

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and make independent findings of fact with regard to plaintiff's employment status.

Youngblood v. North State Ford Truck Sales, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988) (internal citations and quotation marks omitted).

In determining that N.C. Gen. Stat. § 97-19 did not apply here, the Commission concluded that Erwin Oil was not an original or principal contractor because it had not "undertaken for another to do something, the performance of which he has in whole or in part sublet to another." *Evans v. Tabor City Lumber Co.*, 232 N.C. 111, 117, 59 S.E.2d 612, 616 (1950). "G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook*, 99 N.C. App. at 310, 392 S.E.2d at 760. The Commission concluded that although Erwin Oil had a jobber contract with Amoco, this contract did not require Erwin Oil to re-sell the gasoline or perform any other duties, and thus Abbasi was not performing any duties for Erwin Oil that were required by Erwin Oil's contract with Amoco. However, our review of the evidence, especially the plain language of the contract, leads us to the opposite conclusion.

At the time of the hearing in this matter, Erwin Oil owned over twenty stores, some of which were managed directly by Erwin Oil, and some of which were owned by Erwin Oil but run by others. At the time of plaintiff's injury, Erwin Oil had a "branded jobber contract" with Amoco which included the following pertinent provisions:

2. . . . Amoco agrees to sell and Jobber agrees to purchase and receive Amoco's currently offered and available branded petroleum products . . .

* * *

5(d) . . . At all times and at each retail site, including Jobber-Dealer sites, Jobber shall offer for sale, or cause to be offered for sale, representative amounts of each grade of Amoco-based gasoline, currently offered to Jobber, necessary to satisfy public demand.

* * *

8(a) . . . Jobber shall use its best efforts to market the Products covered by this Contract and develop its . . . area.

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The contract further requires Erwin Oil to operate one or more bulk storage plants, and to operate a sufficient number of tank trucks to efficiently perform its delivery functions. Thus, under the contract, Erwin Oil was required to market and sell Amoco products “necessary to satisfy public demand,” using its “best efforts to market the Products.” Erwin Oil could not successfully fulfill these contractual obligations to Amoco without access to retail outlets, such as Tri-Star Amoco, through which to market gasoline to the general public. Furthermore, the addendum to the lease between Erwin Oil and Abbasi states that:

Lessee agrees to maintain this location up to AMOCO’s IMAGE STANDARDS and to operate the facility open to the public 18 hours per day, 7 days a week. Lessee agrees to furnish ERWIN OIL COMPANY, INC., on a daily basis, accurate and current inventory and sales figures of all petroleum products sold and received at this location. Lessee agrees to notify ERWIN OIL COMPANY, INC., immediately [sic] of any unauthorized discharge of petroleum product such as a leak or a spill. Failure to comply with any or all of the provisions of this addendum will give the lessor the right to cancel this lease at lessor’s discretion.

That Erwin Oil and Abbasi had a landlord/tenant relationship does not preclude them from also having a contractor/sub-contractor relationship. As the documents between Erwin Oil and Abbasi required Abbasi “to maintain” and “to operate” the gas pumps seven days a week, we conclude that in those agreements lies a contract for Abbassi to perform work Erwin was required to do—to market and sell gasoline to meet public demand. Thus, we conclude that Erwin Oil is a statutory employer pursuant to N.C. Gen. Stat. § 97-19. Abbasi, as the owner of a gas station and convenience store, was in the business of selling gasoline and sundries to the public. Accordingly, we vacate the Commission’s opinion and award and remand for additional findings of fact, in accordance with this opinion, regarding plaintiff’s injuries and defendant’s liability.

Reversed and remanded.

Judge CALABRIA concurs.

Judge HUNTER dissents in a separate opinion.

The judges participated and submitted this opinion for filing prior to 1 January 2007.

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HUNTER, Judge, dissenting.

I disagree with the majority's conclusion that Erwin Oil was plaintiff's statutory employer pursuant to section 97-19 of the North Carolina General Statutes. The majority's reasoning in this case would greatly expand the definition of a statutory employer beyond its intended scope. I therefore respectfully dissent.

The Commission concluded that section 97-19 did not apply to the instant case. I agree with the Commission's conclusion. The majority recognizes that "G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet." *Cook v. Norvell-Mackorell Real Estate Co.*, 99 N.C. App. 307, 310, 392 S.E.2d 758, 760 (1990) (emphasis added). "Consequently, G.S. § 97-19 may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, i.e., an owner, and an independent contractor." *Id.*

In the instant case, the evidence tends to show that Erwin Oil, a petroleum wholesaler, purchased gasoline from various producers, including Amoco. Erwin Oil in turn leased a convenience store, Tri-Star Amoco, and equipment to Abbasi, who independently operated the store. Erwin Oil also supplied Abbasi with gasoline on consignment for sale at Tri-Star Amoco, and Abbasi received a commission per gallon of gasoline sold at Tri-Star Amoco. Erwin Oil was the owner of the gasoline sold at Tri-Star Amoco. The primary purpose of the contract between Erwin Oil and Amoco was an agreement to purchase gasoline. Although the majority is correct that the contract between Erwin Oil and Amoco also required Erwin Oil to "offer for sale, or cause to be offered for sale, representative amounts of each grade of Amoco-based gasoline, currently offered to [Erwin Oil], necessary to satisfy public demand[,]'" this was not a task then sublet to Abbasi. The majority points to an addendum in the lease agreement requiring Abbasi to maintain the Tri-Star Amoco *location* according to "AMOCO's IMAGE STANDARDS and to operate the *facility* open to the public 18 hours per day, 7 days a week." (Emphasis added.) Contrary to the majority's broad interpretation regarding gasoline pumps, the addendum language is silent as to any specific requirement regarding the sale or marketing of gasoline. The lease agreement between Erwin Oil and Abbasi does not require Abbasi to perform any task required by the contract between Erwin Oil and Amoco. Erwin Oil clearly owned the gasoline offered for sale at Tri-Star Amoco, for which Abbasi merely received a commission. Erwin

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Oil owned the premises which Abbasi leased. Thus, Abbasi was not a subcontractor for Erwin Oil. Rather, the nature of the relationship between Erwin Oil and Abbasi was that of an owner and an independent contractor.

As Erwin Oil did not sublet its duties to Abbasi, Abbasi was not a subcontractor, nor was Erwin Oil a principal contractor. *See Mayhew v. Howell*, 102 N.C. App. 269, 273, 401 S.E.2d 831, 834 (Industrial Commission properly found that the defendant homebuilding company did not sublet any contract for the performance of work to framers and that defendant was not a “‘principal contractor’” with regard to subdivision under construction but the “‘owner’”), *affirmed per curiam*, 330 N.C. 113, 408 S.E.2d 853 (1991). Section 97-19 therefore does not apply, and Erwin Oil cannot be considered plaintiff’s statutory employer. The majority’s interpretation would make Erwin Oil a statutory employer of every employee hired by any independent contractor leasing property owned by Erwin Oil where Amoco gasoline is sold. I believe this interpretation far exceeds the intended scope of section 97-19, and I would affirm the opinion and award of the Commission denying plaintiff’s claim for benefits.



AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, INC., AND SYIDAH
MATTEEN, PLAINTIFFS v. STATE OF NORTH CAROLINA, DEFENDANT

No. COA06-62

(Filed 16 January 2007)

Declaratory Judgments— procedure for administration of oaths—litigation appears unavoidable

A de novo review revealed that the trial court erred by concluding that plaintiffs failed to present a justiciable controversy in their complaint for a declaratory judgment regarding the interpretation of N.C.G.S. § 11-2 describing the procedure for the administration of oaths, because: (1) although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable; (2) plaintiff individual demonstrated her intent to avail herself of her asserted right to swear on her religious text, the Quran, and her intent to litigate that right; (3) the State demonstrated, by its refusal to per-

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mit witnesses to swear on any text other than the Christian Bible, its intent to continue the course of action; (4) the facts do not suggest any impediments to litigation that would make litigation avoidable in the absence of a declaratory judgment; and (5) plaintiff ACLU-NC has sufficiently indicated that its members intend to avail themselves of their rights, ACLU-NC has manifested an intent to litigate the issue, and there is no impediment to litigation which would render litigation avoidable.

Appeal by plaintiffs from judgment entered 9 December 2005 by Judge Donald L. Smith in Wake County Superior Court. Heard in the Court of Appeals 18 September 2006.

Smith, James, Rowlett & Cohen, L.L.P., by Seth R. Cohen, for plaintiff-appellants.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for defendant-appellee.

MARTIN, Chief Judge.

On 26 July 2005, the American Civil Liberties Union of North Carolina, Inc., (“ACLU-NC”) filed a complaint against the State seeking a declaratory judgment interpreting N.C.G.S. § 11-2, the statute that describes the procedure for the administration of oaths. The statute mandates that a person giving an oath “shall . . . require the party to be sworn to lay his hand upon the Holy Scriptures.” N.C. Gen. Stat. § 11-2. ACLU-NC sought a declaratory judgment that the term “Holy Scriptures” appearing in the statute refers not only to the Christian Bible, but also to other religious texts including, but not limited to, the Quran, the Old Testament, and the Bhagavad-Gita. In the alternative, ACLU-NC sought a declaratory judgment that N.C.G.S. § 11-2 is unconstitutional in violation of the Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution and Article 1, Section 13 of the North Carolina Constitution. U.S. Const. amend. I; N.C. Const. art. 1, § 13. ACLU-NC submitted affidavits from eight Jewish members of ACLU-NC who were residents of Guilford County and eligible for jury duty, stating they would prefer to swear on the Hebrew Bible rather than the Christian Bible if selected as jurors or asked to testify in court. ACLU-NC alleged that the Al-Ummil Ummat Islamic Center of Greensboro, North Carolina, offered to donate copies of the Quran to the Guilford County court system to use for swearing in witnesses

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and jurors, but judicial officers declined the offer. ACLU-NC also alleged that it requested that the Administrative Office of the Courts adopt a policy allowing individuals to be sworn using religious texts other than the Christian Bible, but the Administrative Office of the Courts declined the request.

On 29 November 2005, plaintiff ACLU-NC amended its complaint, adding Syidah Mateen as a plaintiff. Ms. Mateen is a Muslim resident of Guilford County who appeared as a witness in district court in August 2003. She requested to be sworn on the Quran, but there was no Quran in the courtroom. Since Ms. Mateen would not swear on the Bible, she affirmed without the use of a religious text. Both plaintiffs sought a declaratory judgment to determine the rights of Ms. Mateen and the members of ACLU-NC under N.C.G.S. § 11-2 or to declare the statute invalid.

In its answer to the amended complaint, the State moved for dismissal of the complaint and asserted, among other defenses, that the plaintiffs' claims were not justiciable because no actual case or controversy existed between the parties. On 9 December 2005, the trial court dismissed the case for lack of jurisdiction due to a lack of justiciable controversy. Plaintiffs appealed the judgment.

The sole issue presented by this appeal is whether either plaintiff has presented a justiciable controversy in their complaint. We conclude the complaint is sufficient to entitle both plaintiffs to litigate their claims under the Declaratory Judgment Act, though we are careful to express no opinion on the merits of those claims.

On appeal, the standard of review of a trial court's dismissal of a complaint for lack of jurisdiction is *de novo*. *Hatcher v. Harrah's N.C. Casino Co.*, 169 N.C. App. 151, 155, 610 S.E.2d 210, 212 (2005).

Plaintiffs brought their claims under the Declaratory Judgment Act, which provides that “[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under [it], and obtain a declaration of rights, status, or other legal relations thereunder.” N.C. Gen. Stat. § 1-254 (2005). The purpose of the Act “is to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations and is to be liberally construed and administered.” *Walker v. Phelps*, 202 N.C. 344, 349, 162 S.E. 727, 729 (1932). Further, a claim brought under the Declaratory Judgment Act must allege a justiciable controversy. *City of New*

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Bern v. New Bern-Craven County Bd. of Educ., 328 N.C. 557, 559, 402 S.E.2d 623, 624-25 (1991); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986). Nevertheless, “a declaratory judgment action may be maintained without actual wrong or loss as its basis.” *McCabe v. Dawkins*, 97 N.C. App. 447, 449, 388 S.E.2d 571, 572 (1990). Accordingly, the plaintiff need not have already sustained an injury to file suit under the Act. However, “[the Supreme Court] has held on a number of occasions that Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute.” *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984).

“Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough.” *Gaston*, 311 N.C. at 234, 316 S.E.2d at 61-62 (citations omitted). Although our courts have not defined the term “unavoidable,” our Supreme Court in *City of New Bern* analyzed existing case law and determined, “[i]n the three cases . . . in which we said that litigation did not appear to be unavoidable, there was an impediment to be removed before court action could be started.” *City of New Bern*, 328 N.C. at 561, 402 S.E.2d at 626. In the first of the three cases, *Sharpe*, the plaintiffs sought interpretation of a contract provision regarding a covenant not to compete. The Court found that plaintiffs did not intend to compete and “there [wa]s no evidence of a practical certainty that the plaintiffs will compete with the defendant”; therefore, litigation was not unavoidable. *Sharpe*, 317 N.C. at 590, 347 S.E.2d at 32. In the second of the three cases, *Gaston*, the Gaston Board of Realtors sought a declaratory judgment that disciplinary proceedings they conducted against defendant were lawful. The evidence suggested that the defendant demonstrated no intent to sue the board over its decision in the proceedings; thus, litigation was not unavoidable. *Gaston*, 311 N.C. at 235, 316 S.E.2d at 62. In the third of the three cases, *Consumers Power*, plaintiffs sought a declaratory judgment determining the validity of their contract with defendant. The Court found “there is no practical certainty that plaintiffs have the capacity or power to perform the acts which would inevitably create a controversy” and thus litigation was not unavoidable. *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 451, 206 S.E.2d 178, 189-90 (1974). In all three cases, the circumstances indi-

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cated a lack of practical certainty that litigation would commence if a declaratory judgment were not rendered, which the Court identified as impediments to litigation. *See City of New Bern*, 328 N.C. at 561, 402 S.E.2d at 626.

Our courts have determined other cases to be non-justiciable due to other impediments, such as cases where the action in controversy has not been performed but is merely speculative, *see Adams v. N.C. Dep't of Natural and Econ. Res.*, 295 N.C. 683, 703-04, 249 S.E.2d 402, 414 (1978); *Wendell v. Long*, 107 N.C. App. 80, 83, 418 S.E.2d 825, 826 (1992), or cases where the ordinance that is the subject of the suit has not been enacted but merely has been proposed. *See City of Raleigh v. Norfolk S. Ry. Co.*, 275 N.C. 454, 464, 168 S.E.2d 389, 396 (1969). Thus, an impediment to litigation could arise in the form of one party's lack of intent to avail himself of his rights, one party's lack of intent to litigate, or the speculative nature of the conflict.

When no impediment is present, litigation is unavoidable and the case is justiciable, as in *City of New Bern*, 328 N.C. at 561, 402 S.E.2d at 626. In that case, the City of New Bern contested the validity of three statutes affecting its right to enforce building codes and giving those rights to the County. The City of New Bern sought to have its rights determined under the statutes. Because the City had the right to enforce building codes before the new statutes were enacted, the Court recognized that its change in status allowed it to sue under the Declaratory Judgment Act. The facts of the case showed the City's intent to avail itself of its rights, its intent to litigate, and the non-speculative nature of the conflict. Accordingly, the Court was satisfied that no impediment to litigation was present in the case and litigation was unavoidable. *Id.* at 561, 402 S.E.2d at 626. We now consider in the case at hand whether any of the recognized impediments operate to make litigation between plaintiffs ACLU-NC and Syidah Mateen and defendant avoidable.

We consider this question first with respect to plaintiff Syidah Mateen. When Ms. Mateen appeared as a witness, she requested that her oath to tell the truth be sworn on the holy text of her religious faith, the Quran. When her request was denied and because she would not swear on the Christian Bible, her options were to affirm without the use of a religious text or be denied the opportunity to testify. *See N.C.R. Evid. 603 (2005)* ("Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."). Ms. Mateen chose to affirm

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to tell the truth, and she now seeks a declaratory judgment determining whether, under N.C.G.S. § 11-2, she has the right to swear on her holy text, the Quran. Under these circumstances, Ms. Mateen clearly demonstrated her intent to avail herself of her asserted right to swear on her religious text and her intent to litigate that right. The State has clearly demonstrated, by its refusal to permit witnesses to swear on any text other than the Christian Bible, its intent to continue the course of action; thus, its actions are not speculative. The facts do not suggest any impediments to litigation that would make litigation avoidable in the absence of a declaratory judgment. Finding no impediment to litigation, we conclude that litigation between plaintiff Mateen and defendant is unavoidable.

We next consider whether an impediment to litigation exists between ACLU-NC and the State. ACLU-NC submitted affidavits from eight of its members from Guilford County, eligible for jury duty, who are Jewish and would prefer to swear on the Old Testament rather than the Christian Bible. ACLU-NC further alleged that it has approximately 8,000 members throughout the state, many of whom are of Islamic or Jewish religious faith. ACLU-NC argues that it is not a matter of "if" one of its members who would prefer to swear on a different religious text will be called to serve as a juror or witness, but rather it is a matter of "when." We agree. ACLU-NC has sufficiently indicated that its members intend to avail themselves of their rights, and ACLU-NC has manifested an intent to litigate the issue. The State's policy is not speculative. Although it cannot be predicted exactly when or how much time will pass until a member of ACLU-NC who would prefer to swear on a holy text other than the Christian Bible is required to take an oath in court, there is sufficient practical certainty that such situation will occur. Accordingly, there is no impediment to litigation which would render litigation avoidable. Because litigation is unavoidable, the case is justiciable under the Declaratory Judgment Act, allowing ACLU-NC to obtain from the court an interpretation of N.C.G.S. § 11-2 and the rights of its members under the statute.

Reversed.

Judges ELMORE and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 JANUARY 2007

BOYD v. NATIONWIDE MUT. INS. CO. No. 06-349	Carteret (02CVS458)	Affirmed
JENKINS v. JONES-ONSLOW EMC No. 06-23	Onslow (05CVD1227)	Dismissed
JONES v. GARCIA No. 06-459	Wilkes (04CVS2348)	Affirmed
STATE v. SANDERS No. 06-91	Wake (02CRS108496-98)	No error
STATE v. TOLLIVER No. 05-1687	Forsyth (02CRS38882) (02CRS38885-86)	No prejudicial error
WALDON v. BURRIS No. 06-325	Union (01CVS1455)	Remanded in part, affirmed in part

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ALENE LEGETTE, EMPLOYEE, PLAINTIFF-APPELLEE v. SCOTLAND MEMORIAL HOSPITAL, EMPLOYER, SOUTH CAROLINA PROPERTY AND CASUALTY GUARANTY ASSOCIATION, CARRIER, DEFENDANTS-APPELLANTS

No. COA06-148

(Filed 6 February 2007)

1. Workers' Compensation— findings of facts—nurse lifting patient—lymphedema

There was competent evidence in a workers' compensation case supporting the Industrial Commission's findings of the facts in a case where a nurse suffered lymphedema after lifting a patient. Those findings were binding even though there was evidence to support contrary findings.

2. Workers' Compensation— injury by accident—nurse lifting patient—short-staffed

The findings of the Industrial Commission in a workers' compensation case establish that a nurse who suffered lymphedema after lifting a patient was performing a task that was not part of her normal work routine and that she suffered an accident. Moving patients was normally a two-person job, but the hospital was understaffed and plaintiff had to position her body differently than normal and use more force than was normal.

3. Workers' Compensation— notice—actual—findings supported by plaintiff's testimony

Plaintiff's testimony supported findings in a workers' compensation case that she had provided actual notice of her injury. A mistake in the date was not material.

4. Workers' Compensation— actual notice—further findings—reasonable excuse for delay in written notice

A finding of actual notice of the injury by accident in a workers' compensation case meant that findings about written notice and prejudice to defendant by plaintiff's delay in providing written notice were not required. Furthermore, a finding that plaintiff gave verbal notice of the injury to her shift supervisor constituted an implicit finding that plaintiff had a reasonable excuse for failing to give written notice within thirty days of the accident.

5. Workers' Compensation— reopening record—no abuse of discretion

The Industrial Commission did not abuse its discretion by reopening the record in a workers' compensation case to receive further evidence.

6. Workers' Compensation— record reopened for plaintiff— no additional material from defendants

The Industrial Commission did not abuse its discretion in a workers' compensation case by not allowing defendants to re-depose their expert witnesses, or to present new briefs or arguments, after plaintiff was allowed to take the deposition of a doctor after the evidence closed. Defendants had the opportunity to cross-examine plaintiff's expert during the deposition, they never requested the opportunity to re-depose their witnesses, and the Commission ruled only that no further oral arguments or briefs would be required, not that defendants could not present additional arguments.

7. Workers' Compensation— testimony of doctor as expert— experience in treating condition

Testimony from a doctor in a workers' compensation case about whether plaintiff's accident aggravated her lymphedema was sufficiently reliable, based on the experience of the doctor in treating lymphedema. Any lingering questions go to the weight of the testimony.

8. Workers' Compensation— testimony of doctor—sufficiency

The testimony of a doctor in a workers' compensation case about causation did not present "could" or "might" testimony and was not based solely on the notion of post hoc ergo propter hoc (after it, therefore because of it). The doctor repeatedly testified to a medical certainty that plaintiff's accident at work probably aggravated her pre-existing lymphedema, and that plaintiff's description of the accident was consistent with trauma of the type associated with the development of lymphedema in someone with plaintiff's medical history.

Appeal by Defendants from opinion and award entered 6 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2006.

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The Jernigan Law Firm, by Gina E. Cammarano, for Plaintiff-Appellee.

Young Moore and Henderson P.A., by Jeffrey T. Linder, Michael W. Ballance, and Angela N. Farag, for Defendants-Appellants.

McGEE, Judge.

Scotland Memorial Hospital (the hospital) and South Carolina Property and Casualty Guaranty Association (collectively Defendants) appeal from an opinion and award of the North Carolina Industrial Commission (the Commission) filed 6 October 2005. The Commission's opinion and award reversed an opinion and award by Deputy Commissioner Phillip A. Holmes, which had determined that Alene Legette (Plaintiff) did not sustain a compensable injury by accident.

At a hearing before the Deputy Commissioner, Plaintiff testified that she became a registered nurse in 1971, and began working as a nurse for the hospital in October 2000. Plaintiff worked the night shift every Friday, Saturday and Sunday. Plaintiff testified that she hurt her left arm as she was repositioning a patient during her shift at the hospital on 12 October 2001. Plaintiff testified that pulling a patient up in bed "was normally a two-person maneuver." However, because the hospital was understaffed, Plaintiff had to reposition a patient without assistance. She testified that because she had no help in moving the patient, it was necessary for her to stand closer to the patient and to the bed than she would have with assistance. Plaintiff also testified that the patient was heavy and non-ambulatory and that she had to use more force than if she had had assistance.

Plaintiff testified that when she moved the patient, she felt "a sharp pain underneath [her] left armpit or breast area extending toward the back of [her] shoulder and in [her] arm and shoulder[.]" Plaintiff further stated that "[a]lmost immediately in just a little while, [her] arm started swelling, and it extended further down [her] arm into [her] wrist to the tops of [her] fingers."

Plaintiff testified that she completed her shift and worked her next two shifts. Plaintiff took Ibuprofen for her pain and swelling. Plaintiff testified that during her 13 October 2001 to 14 October 2001 shift, she "went down to the emergency room with [her] shift supervisor, and [they] saw the emergency room doctor." Plaintiff testified that the doctor offered her Lortab for her pain, but Plaintiff declined to take the medicine while working.

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Suzanne Parent (Ms. Parent) testified that she was a registered nurse on staff at the hospital in October 2001. Ms. Parent testified that she remembered when Plaintiff injured her arm and that Plaintiff told her she had injured her arm “pulling a patient.” Ms. Parent also testified that she saw Plaintiff’s arm the next night and that Plaintiff’s “left arm had swollen about two times its normal size. It was a deep, beefy red.” Gail Peterson (Ms. Peterson) testified that she was a “nursing supervisor, patient care supervisor” at the hospital in October 2001. Ms. Peterson testified that the hospital encouraged nurses to get help when moving heavy patients.

Plaintiff testified that she went to her family physician, Dr. James Currin (Dr. Currin), for treatment on 15 October 2001. Dr. Currin gave Plaintiff a prescription for an antibiotic and an anti-inflammatory. Plaintiff testified that she returned to work for her next series of weekend shifts on 19 October 2001. However, Plaintiff showed her arm to her supervisor, Ms. Peterson, and told Ms. Peterson that the pain and swelling in her left arm was severe. Ms. Peterson told Plaintiff to go home. Plaintiff left work on 20 October 2001 and has not returned to work.

Plaintiff saw Dr. Diana B. McNeill (Dr. McNeill) at Duke University Medical Center on 19 November 2001. Dr. McNeill noted that Plaintiff was having a “significant problem with lymphedema in the left arm after heavy lifting.” Dr. McNeill also noted that Plaintiff had a “history of breast carcinoma with left modified radical mastectomy with no dissection 10/10 nodes negative and 37 radiation treatments since 1998.” Dr. McNeill also stated: “I think [Plaintiff] really needs a referral to the lymphedema clinic.” Plaintiff was also seen on 27 November 2001 by Dr. Brian Parkes (Dr. Parkes), a general surgeon in Laurinburg, who also noted Plaintiff’s history of breast cancer. Dr. Parkes stated: “[Plaintiff] was doing some heavy lifting at work and felt pain in her biceps region and serratus anterior. Subsequently she developed pitting edema from the elbow to the hand.” Plaintiff was also seen by several other doctors.

After the hearing before the Deputy Commissioner, Defendants took the deposition of Dr. George Paschal, III (Dr. Paschal), who testified that about twenty percent of people who have radiation and surgery for breast cancer will develop lymphedema. Dr. Paschal explained that lymphedema is a disorder caused by “the malarrangement of lymphatic flow secondary to an obstruction.” Dr. Paschal further stated that “[t]he disorder will slowly progress over time until it

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reaches a point that symptoms become noticeable to the patient.” Dr. Paschal further testified as follows: “The scarring slowly contracts over a period of time, three to five years usually before you see any obstruction of flow, although it can happen sooner and it can happen later.” Dr. Paschal stated that Plaintiff likely suffered from lymphedema. However, Dr. Paschal also stated that “the activities [Plaintiff] performed on the day in question were simply what she was doing when the lymphatic flow was curtailed sufficient to bring her condition to her attention, but did not cause or materially aggravate or materially accelerate the underlying pathology.”

The Deputy Commissioner filed an opinion and award on 12 July 2004, concluding that Plaintiff did not sustain a compensable injury by accident. Plaintiff appealed to the Commission and filed a Form 44, setting forth several alleged errors. After the parties filed briefs, the Commission ordered the case to be reopened. The Commission further ordered that “the parties shall have 60 days from the date of [the] Order within which to take the deposition of Dr. James Currin.”

Plaintiff’s counsel tendered Dr. Currin as an expert in medicine, with a specialty in family practice, and Defendants’ counsel objected. Dr. Currin testified that he was a board certified family practitioner who practiced at Laurinburg Family Practice from 1980 until his retirement on 6 July 2004. Over the course of his twenty-five year career, Dr. Currin treated about one hundred patients with lymphedema. However, because Dr. Currin saw his patients multiple times during his twenty-five year career, he may have seen those one hundred patients with lymphedema “a thousand times.”

Dr. Currin testified that he saw Plaintiff in October 2001, and diagnosed her with lymphedema. Plaintiff’s arm was swollen and painful. Dr. Currin testified that Plaintiff’s alleged accident at work “may have caused [her left arm swelling], or certainly may have aggravated [her left arm swelling] if she was prone to lymphedema related to the previous breast cancer surgery.” Dr. Currin also testified that Plaintiff’s alleged accident “probably aggravated [her left arm swelling].” Dr. Currin further testified as follows:

Q. Okay, and what’s the basis for your opinion?

A. The fact that she had no symptoms prior to that day.

Q. Okay, and was the way that [Plaintiff] described the incident consistent with a trauma of the type that would be associated

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with the development of lymphedema with someone with her history?

[DEFENDANTS' COUNSEL]: Objection.

A. Yes.

Dr. Currin also testified that, assuming Plaintiff had some pre-existing, asymptomatic lymphedema, Plaintiff's alleged accident at work "did aggravate the condition." Dr. Currin testified that the basis of his opinion was that "[Plaintiff] had had no problems with that arm prior to that injury."

On redirect examination, Dr. Currin testified as follows:

Q. Okay, but would you be able to say that [Plaintiff's alleged accident] more likely than not aggravated [any pre-existing asymptomatic lymphedema]?

A. Based on my history from her that day that prior to that incident she had had no problem, and after that her symptoms started, it would be that that's when the problem started.

Q. Okay. So just to clarify, because it's important, as you talked about before . . . , can you testify that . . . that incident more likely than not or probably aggravated her underlying . . . condition or her predisposition to lymphedema?

[DEFENDANTS' COUNSEL]: Objection.

A. Yes.

The Commission filed an opinion and award on 6 October 2005, concluding, *inter alia*, that on 12 October 2001, Plaintiff sustained an injury by accident arising out of and in the course of her employment with the hospital. The Commission also concluded that Defendants had actual notice of Plaintiff's injury by accident. Defendants appeal.

Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether the Commission's conclusions of law are justified by the findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457

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S.E.2d 315, 317 (1995). The Commission's conclusions of law are reviewable *de novo*. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 783 (2003).

I.

[1] Defendants first argue the Commission erred by concluding that “[P]laintiff sustained an injury by accident arising out of and in the course of her employment with [the hospital].” An accident is “‘an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.’” *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E.2d 360, 363 (1980) (quoting *Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E.2d 289, 292 (1957)). “The elements of an ‘accident’ are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences.” *Id.* However, “once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee’s normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an ‘injury by accident’ under the Workers’ Compensation Act.” *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985).

In the present case, the Commission made the following relevant findings of fact:

2. On October 12, 2001, [P]laintiff was injured while repositioning a patient. Because the hospital was understaffed, she had no one to assist her in what was normally a two-person maneuver to pull a patient up in bed. Therefore, [P]laintiff moved the patient by herself, which meant that she had to position her body differently than she normally would, by standing closer to the patient and to the head of the bed. This particular patient was heavy, non-ambulatory, and unable to assist [P]laintiff with the move. Plaintiff had to use more force with her arms and legs than usual. As she moved the patient, [P]laintiff felt a sharp pain underneath her left armpit and in her breast area.

3. Soon after the lifting incident, [P]laintiff’s left arm began swelling into her wrist and fingers. Sue Parent, another nurse on the floor, saw [P]laintiff’s swollen left arm and recalled that [P]laintiff said she injured the arm pulling a patient. Ms. Parent also testified that the following night [P]laintiff’s arm was swollen to twice the normal size and was dark red. Plaintiff’s supervisor did not recall whether [P]laintiff reported the left arm

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injury on October 12, 2001. Plaintiff continued to work the rest of her shift and took Ibuprofen to try to reduce the pain and swelling. Plaintiff also worked the following two nights. During the shift on October 13, 2001, [P]laintiff went with Monica Miller, the shift supervisor, to the Emergency Room where a doctor offered to give [P]laintiff Lortab, a prescription painkiller that [P]laintiff declined to take while working.

Defendants do not specifically challenge the testimonial support for these findings. Rather, Defendants argue that Plaintiff could not recall the name, gender or room number of the patient she was lifting at the time of the alleged accident. Defendants also argue that the supervisor to whom Plaintiff allegedly reported the accident did not work on 13 October 2001 and that the hospital's records did not show evidence that Plaintiff was seen in the emergency room on that date. Defendants further argue that, although the Commission found it was unusual for Plaintiff to have moved a patient by herself, Plaintiff admitted that she had moved patients by herself on prior occasions. Plaintiff's supervisor, Ms. Peterson, also testified that other nurses lifted patients by themselves. Furthermore, Defendants argue that although the Commission found that the patient Plaintiff moved was non-ambulatory and heavy, most patients are moved when they are asleep and therefore most patients are heavy and non-ambulatory.

However, even though there may have been competent evidence in the record to support contrary findings, as Defendants assert, the findings of the Commission are binding because they are supported by the competent testimony of Plaintiff and Ms. Parent. *See Jones*, 118 N.C. App. at 721, 457 S.E.2d at 317.

[2] Defendants also argue that "even if one believes [P]laintiff's story, her incident at work does not constitute a compensable 'accident.'" In support of their argument, Defendants cite *Landry v. U.S. Airways, Inc.*, 150 N.C. App. 121, 563 S.E.2d 23, *rev'd per curiam for reasons stated in the dissent*, 356 N.C. 419, 571 S.E.2d 586 (2002), where our Supreme Court adopted Judge Hunter's dissent. In *Landry*, the plaintiff was injured at work when he grabbed a mailbag that was heavier than he expected. *Id.* at 122, 563 S.E.2d at 24. The Commission found that the plaintiff was required to load and unload mail, freight and luggage as part of his job; that the packages, which included mail sacks, ranged in weight from one pound to four hundred pounds; that there was no way for the plaintiff to know how much the packages weighed until he picked them up; that it was not unusual for certain mailbags to be heavy and for the plaintiff to be

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unaware of this until he picked them up; that the plaintiff was performing his normal job duties in the normal manner and using his normal motion when he was injured; that the plaintiff never knew the weight of a mailbag until he lifted it; and that “[m]ailbags often varied in weight and were heavier or lighter than anticipated.” *Id.* at 122-23, 563 S.E.2d at 25. The Commission then concluded that the plaintiff did not sustain an injury by accident. *Id.* at 123, 563 S.E.2d at 25. The majority in the Court of Appeals held that the Commission’s finding that “[m]ailbags often . . . were heavier or lighter than anticipated[,]” was unsupported by the evidence because the Plaintiff never testified that the fact that mailbags were often overweight was unanticipated by him. *Id.* at 124, 563 S.E.2d at 26. The majority also pointed out that the plaintiff “testified he could generally estimate the weight of mailbags by sight but found this particular mailbag heavier than anticipated.” *Id.* The majority held that the plaintiff’s undisputed testimony supported a finding that “an unlooked for and untoward event occurred which was not expected by [the] [p]laintiff[,]” leading to the conclusion that the plaintiff sustained an injury by accident. *Id.* Thus, the majority reversed the Commission and remanded the matter. *Id.* at 124-25, 563 S.E.2d at 26.

The dissent stated:

Although [the] plaintiff may not have specifically stated that the mailbags were often heavier or lighter than “anticipated,” the evidence as a whole clearly supports the Commission’s findings that [the] plaintiff’s job required him to lift weights of up to 400 pounds; that [the] plaintiff never knew prior to lifting mailbags how much they weighed; that it was not unusual for mailbags to be extremely heavy and that [the] plaintiff would be unaware of the heavy weight of the bags until he lifted them; and that [the] plaintiff was engaged in his normal duties and using his normal motions when injured.

Id. at 126, 563 S.E.2d at 27. The dissent also held that these findings, which were supported by competent evidence, supported the Commission’s conclusion that the plaintiff did not sustain an injury by accident. *Id.* On appeal, our Supreme Court adopted the dissent, thereby reversing the Court of Appeals’ majority opinion. *Landry*, 356 N.C. at 419, 571 S.E.2d at 587.

Unlike *Landry*, the findings in the present case establish that Plaintiff was performing a task that was not part of her normal work routine when she was injured. Moving patients was normally a two-

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person job. Again, although there was evidence that could have supported a contrary finding, we are bound by the findings because they are supported by the competent testimony of Plaintiff and Ms. Parent. *See Jones*, 118 N.C. App. at 721, 457 S.E.2d at 317. Because the hospital was understaffed and Plaintiff had to move the patient by herself, she had to position her body differently than normal and had to use more force than normal. On the contrary, the plaintiff in *Landry*, as determined by the findings in that case, was performing his normal job in the usual manner when he was injured. *Landry*, 150 N.C. App. at 126, 563 S.E.2d at 27. Moreover, in *Landry*, it was not unusual for mailbags to be extremely heavy and for the plaintiff to be unaware of this until he lifted them. *Id.*

We conclude that the Commission's findings of fact, which are supported by competent evidence, support its conclusion of law that “[P]laintiff sustained an injury by accident arising out of and in the course of her employment with [the hospital].” Therefore, we affirm the order of the Commission.

II.

[3] Defendants next argue that even if Plaintiff suffered a compensable injury by accident, Plaintiff's claim still should have been barred for failure to give timely written notice of the accident to her employer, pursuant to N.C. Gen. Stat. § 97-22. Under N.C. Gen. Stat. § 97-22 (2005),

Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and . . . no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

However, our Court has held that the “[f]ailure of an employee to provide written notice of her injury will not bar her claim where the employer has actual knowledge of her injury.” *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172, 573 S.E.2d 703, 706 (2002), *disc. review denied*, 357 N.C. 251, 582 S.E.2d 271 (2003).

Defendants make three specific arguments: (1) there is no evidence to support the Commission's finding that the hospital had

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actual notice of Plaintiff's injury by accident on 13 October 2001; (2) the Commission failed to find that Plaintiff provided a reasonable excuse for not giving written notice; and (3) the Commission's findings do not justify its conclusion that Defendants were not prejudiced.

The Commission found that “[the hospital] had actual, verbal notice of the injury by accident on October 13, 2001, when [P]laintiff's supervisor went with her to the Emergency Room[.]” Defendants argue (1) that there is no competent evidence to support the finding because the emergency room records do not show that Plaintiff was seen there, (2) that the nurses' communication notebook shows that the person to whom Plaintiff allegedly reported her injury, Monica Miller, did not work with Plaintiff on 13 October 2001, and (3) that Arletha Brown was Plaintiff's shift supervisor on 13 October 2001 and testified that Plaintiff did not report an injury to her.

The Commission's challenged finding is supported by the testimony of Plaintiff, who testified that her shift supervisor, Monica Miller, accompanied her to the hospital's emergency room on 13 October 2001. Although the Commission appears to have been mistaken in referring to the date as 13 October 2001, rather than 14 October 2001, when Monica Miller filled in as Plaintiff's shift supervisor, this mistake is not material. The remainder of the Commission's finding is supported by competent evidence. Therefore, the hospital had actual notice of Plaintiff's injury by accident, which obviated the need for Plaintiff to provide written notice. *See Lakey*, 155 N.C. App. at 172, 573 S.E.2d at 706.

[4] Defendants also argue the Commission erred by failing to find that Plaintiff had a reasonable excuse for the delay in providing written notice. However, because the Commission found that Defendants had actual knowledge of Plaintiff's injury, the Commission was not required to make a finding regarding written notice. Even assuming, *arguendo*, that the Commission was required to make such a finding, the Commission did find that “[P]laintiff's application for disability benefits provided written notice of the incident on November 27, 2001.” Although this was more than thirty days after the incident, our Court has held that “a ‘reasonable excuse’ for failing to give timely notice includes ‘a belief that [the] employer is already cognizant of the accident.’” *Westbrooks v. Bowes*, 130 N.C. App. 517, 528, 503 S.E.2d 409, 416 (1998) (quoting *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987)). Therefore, by finding that

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Plaintiff gave verbal notice of the injury by accident to her shift supervisor, the Commission implicitly found that Plaintiff believed the hospital was already cognizant of her injury and that Plaintiff had a reasonable excuse for failing to give written notice within thirty days of the accident.

Defendants also argue the Commission's findings do not support its conclusion that Defendants were not prejudiced by Plaintiff's delay in providing written notice of the accident. However, because the Commission found that the hospital had actual knowledge of Plaintiff's injury, the Commission was not required to make findings regarding prejudice to Defendants. We overrule the assignments of error grouped under this argument.

III.

[5] Defendants next argue the Commission erred

by allowing Plaintiff to take the deposition of Dr. James Currin after the record had closed, after briefs had been presented, and after oral argument had taken place, where Plaintiff had not made such a request before the Deputy Commissioner and did not make such a request in either the Form 44 or brief to the . . . Commission on appeal.

Under N.C. Gen. Stat. § 97-85 (2005),

[i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]

Defendants argue that N.C.G.S. § 97-85 "is predicated on the notion that the party seeking to reopen the record will have raised this as an issue with particularity in advance, and the opposing party will have been given an opportunity to respond." Defendants cite *Roberts v. Wal-Mart Stores, Inc.*, 173 N.C. App. 740, 619 S.E.2d at 907 (2005), where our Court held that the portion of the Workers' Compensation Rules requiring appellants to state with particularity the grounds for appeal may not be waived by the Commission. *Id.* at 744, 619 S.E.2d at 910. In *Roberts*, the plaintiff alleged that while working in the defendant-employer's cafe, she "felt a snap in her lower back as she was lifting a bag-in-a-box of soft drink syrup weighing fifty-five

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pounds.” *Id.* at 741, 619 S.E.2d at 908. The plaintiff notified the defendant-employer of her injury more than six months after the incident. *Id.* at 742, 619 S.E.2d at 909. A deputy commissioner held that the plaintiff suffered a compensable incident at work, but concluded that the plaintiff’s claim should be denied for failure to give timely notice pursuant to N.C.G.S. § 97-22. *Id.* The plaintiff filed a notice of appeal with the Commission, but did not file a Form 44 or a brief with the Commission. *Id.*

In *Roberts*, the Commission issued an order waiving oral argument and announced it would file a decision based upon the record. *Id.* The defendant-employer and the defendant insurance company (collectively the defendants) petitioned the Commission to allow them to present oral and written arguments, but never received a response. *Id.* The Commission found that the plaintiff had been unable to earn the same or greater wages for a period of approximately two months and awarded the plaintiff total disability compensation for that period of time. *Id.* at 742-43, 619 S.E.2d at 909. The Commission further instructed the defendants to pay all of the plaintiff’s medical expenses incurred as a result of the compensable injury. *Id.* at 743, 619 S.E.2d at 909.

On appeal, the defendants argued “they were prejudiced by the . . . Commission’s sudden declaration . . . that [the] plaintiff’s claims would be decided without briefs or oral arguments and that its decision would be based upon the record.” *Id.* at 743-44, 619 S.E.2d at 910. Our Court recognized that pursuant to Rule 701(2) of the Workers’ Compensation Rules, the “[f]ailure to state with particularity the grounds for appeal shall result in abandonment of such grounds, as provided in paragraph (3).” *Id.* at 744, 619 S.E.2d at 910 (quoting Workers’ Comp. R. of N.C. Indus. Comm’n 701(2), 2005 Ann. R. (N.C.) 919, 943). Rule 701(3) states that “[p]articular grounds for appeal not set forth in the application for review shall be deemed abandoned, and argument thereon shall not be heard before the Full Commission.” *Id.* (quoting Workers’ Comp. R. of N.C. Indus. Comm’n 701(3), 2005 Ann. R. (N.C.) 919, 943). While our Court also recognized that the Commission has the discretion to waive the use of a Form 44, we held that “the portion of Rule 701 requiring [an] appellant to state with particularity the grounds for appeal may not be waived by the . . . Commission.” *Id.* Our Court reversed the Commission and vacated its opinion and award. *Id.*

In the present case, based upon *Roberts*, Defendants argue they were unfairly deprived of notice that Plaintiff would request the

opportunity to present additional evidence. However, *Roberts* is inapposite. In *Roberts*, the Commission violated its own rules by deciding the appeal based upon the record when the plaintiff never set forth the grounds for appeal. In the present case, Plaintiff filed a Form 44 setting forth the grounds for appeal. However, because the Deputy Commissioner determined that Plaintiff did not suffer an injury by accident, Plaintiff's grounds for appeal focused on that determination. When Plaintiff made application to the Commission, the Commission was authorized, pursuant to N.C.G.S. § 97-85, to re-open the record to take additional evidence.

The present case is analogous to *Lynch v. Construction Co.*, 41 N.C. App. 127, 254 S.E.2d 236, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979), where the plaintiff sought benefits for an injury by accident that allegedly occurred at work. *Id.* at 127, 254 S.E.2d at 236. The plaintiff alleged he slipped and fell at work on 1 March 1973, but did not report the fall to his foreman until 5 March 1973. *Id.* at 127-28, 254 S.E.2d at 236. The plaintiff was treated for pain two weeks after the accident and continued to work for the defendant until 8 May 1973, when he was admitted to the hospital. *Id.* at 128, 254 S.E.2d at 236-37. Dr. Guy L. Odom (Dr. Odom) operated on the plaintiff to remove a ruptured disc on 22 May 1973 and continued to treat the plaintiff thereafter. *Id.* at 128, 254 S.E.2d at 237. Dr. Odom opined that the "plaintiff reached maximum improvement by 13 December 1973 with a 20 percent permanent partial disability." *Id.* "The deputy hearing commissioner sustained objections by [the] defendant's counsel to two questions asked of Dr. Odom as to whether the witness had an opinion satisfactory to himself 'as to what caused' the condition of which [the] plaintiff complained." *Id.* Dr. Odom then testified that the plaintiff's condition could have been caused by several factors other than a fall. *Id.* The deputy commissioner found that the plaintiff sustained an injury by accident on 1 March 1973, entitling him to "temporary total disability from 8 May 1973 to 13 December 1973 and for 20 percent permanent partial disability . . . for a period of sixty weeks." *Id.*

On appeal, the Commission, on its own motion, remanded the case to take additional medical testimony regarding the causal connection. *Id.* The defendant appealed and we granted the defendant's petition for writ of certiorari. *Id.* at 129, 254 S.E.2d at 237. The defendant argued the Commission exceeded the power granted to it by N.C.G.S. § 97-85 because no good ground was shown to receive further evidence. *Id.* The defendant specifically argued that "the

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'good ground' which [N.C.]G.S. [§] 97-85 requires to be shown before the Commission may 'receive further evidence' means something more than the mere failure of a claimant to make out his case after he has had a fair opportunity to do so." *Id.* at 130, 254 S.E.2d at 238.

Our Court recognized that "[i]t is axiomatic that the Workmens' Compensation Act should be liberally construed to achieve its purpose of providing compensation to employees injured by accident arising out of and in the course of their employment[.]" *Id.* Our Court also recognized that the strict procedural rules applicable to ordinary civil actions are not appropriate in workers' compensation proceedings. *Id.* Our Court held that the powers given to the Commission under N.C.G.S. § 97-85 "are plenary powers to be exercised in the sound discretion of the Commission. Specifically, we hold that whether 'good ground be shown therefore' in any particular case is a matter within the sound discretion of the Commission[.]" *Id.* at 130-31, 254 S.E.2d at 238. We then held that the Commission did not abuse its discretion, and we affirmed the Commission's opinion and award. *Id.* at 131, 254 S.E.2d at 238.

In the present case, as in *Lynch*, Defendants have not demonstrated that the Commission abused its discretion by reopening the record to receive further evidence. Because the Deputy Commissioner determined that Plaintiff did not sustain a compensable injury by accident, Plaintiff's grounds for appeal focused on that ruling. The Commission had the discretion to reopen the record on the issue of causation, especially where the Deputy Commissioner did not reach that issue. We overrule the assignments of error grouped under this argument.

IV.

[6] Defendants argue the Commission abused its discretion and deprived Defendants of due process by allowing Plaintiff to take Dr. Currin's deposition "where Defendants were not subsequently allowed to [re-depose] their expert witnesses, or to present new briefs or arguments encompassing all of the evidence in the case." Defendants rely upon *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000), where the plaintiff, a stocker for K-Mart, sustained a compensable injury "when she lifted a box of stationery to put into a shopping cart and pulled a muscle in her left side." *Id.* at 298-99, 528 S.E.2d at 61. The plaintiff was seen by a doctor at Urgent Care, and then by an orthopedic surgeon, who released the plaintiff to return to work without restriction and who further stated that the plaintiff

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would not have any permanent partial impairment rating. *Id.* at 299, 528 S.E.2d at 61-62. The plaintiff continued to work until she had a disagreement with a personnel officer. *Id.* at 299, 528 S.E.2d at 62. The plaintiff did not return to work after 30 August 1995. *Id.*

The plaintiff began seeing a family physician, Dr. Miller, who initially diagnosed the plaintiff as having a cervical and lumbar muscle strain. *Id.* at 300, 528 S.E.2d at 62. Dr. Miller also noted that the plaintiff "had been depressed and suffering from anxiety/panic attacks for more than one and one-half years." *Id.* Dr. Miller eventually "diagnosed [the] plaintiff with fibromyalgia 'sort of by exclusion because all of the other tests . . . looked pretty normal.'" *Id.* However, the plaintiff never sought a specialist in the field of fibromyalgia prior to the hearing before a deputy commissioner. *Id.* The deputy commissioner found that as of 30 August 1995, the plaintiff was no longer disabled as a result of her compensable injury. *Id.* The deputy commissioner awarded the plaintiff all medical expenses she incurred as a result of her compensable injury, but denied any medical expenses for treatment of fibromyalgia. *Id.*

The plaintiff filed notice of appeal and, five months later, filed a "motion for independent psychiatric and fibromyalgia specialist examinations." *Id.* at 300-01, 528 S.E.2d at 62. The defendants objected but the Commission did not respond to the objection, and the Commission allowed the plaintiff sixty days to obtain psychiatric and rheumatology expert opinions. *Id.* at 301, 528 S.E.2d at 62-63. The Commission allowed the plaintiff an additional extension of time and the plaintiff then submitted a psychiatric report by Dr. Margaret Dorfman (Dr. Dorfman). *Id.* at 301, 528 S.E.2d at 63. The plaintiff also asked the Commission to allow her to see Dr. Alan Spanos (Dr. Spanos), who was a general practitioner with experience in diagnosing and treating fibromyalgia, instead of seeing a rheumatologist. *Id.* The defendants again objected, but the Commission allowed the plaintiff to see Dr. Spanos and submit his report to the Commission, without addressing the defendants' objection. *Id.* at 301-02, 528 S.E.2d at 63.

The Commission relied upon Dr. Dorfman's report to find that the plaintiff's "psychiatric problems, panic attacks and depression . . . were caused or significantly aggravated by her injury by accident[.]" *Id.* at 302, 528 S.E.2d at 63. The Commission relied upon Dr. Spanos' report to find that the plaintiff's "fibromyalgia, related pain syndromes and her musculoskeletal and neuropathic disfunc-

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tions . . . were caused or significantly aggravated by her injury by accident[.]” *Id.*

On appeal, our Court reversed the Commission’s opinion and award, recognizing that “[t]he evidence offered by Drs. Spanos and Dorfman was completely different from any other evidence admitted up to then.” *Id.* at 304, 528 S.E.2d at 64-65. We also recognized that the defendants had filed five separate objections to the independent medical examinations, a request to depose the new physicians, and six requests for an independent medical examination by a physician of the defendants’ choosing, and that the Commission did not respond to any of the objections or requests. *Id.* at 302-03, 528 S.E.2d at 63-64. Our Court held as follows:

We agree with [the] defendants that the Commission manifestly abused its discretion by allowing significant new evidence to be admitted but denying [the] defendants the opportunity to depose or cross-examine the physicians, or requiring [the] plaintiff to be examined by experts chosen by [the] defendants. Therefore, we hold that where the Commission allows a party to introduce new evidence which becomes the basis for its opinion and award, it must allow the other party the opportunity to rebut or discredit that evidence.

Id. at 304, 528 S.E.2d at 64-65.

In the present case, unlike in *Allen*, Defendants had the opportunity to, and did, cross-examine Dr. Currin during his deposition. Defendants also argue they were not allowed to re-depose their expert witnesses and were not allowed to present new briefs or arguments. However, Defendants never requested the opportunity to re-depose their witnesses. Rather, in their letter objecting to the Commission’s decision to allow Plaintiff to depose Dr. Currin, Defendants stated:

It would be prejudicial to [D]efendants, and contrary to basic procedure, for [P]laintiff to now be allowed to call her expert witnesses after [D]efendants have called theirs. The only remedy would be to allow [D]efendants to re-call Dr. Paschal and Mr. Moore again after [P]laintiff's experts testify, and tax the costs of those depositions to [P]laintiff.

Also, the Commission did not rule that Defendants could not present additional argument. The Commission only stated, in its order reopening the case, that “[n]o further oral arguments or briefs will

be required." For the reasons stated above, we overrule these assignments of error.

V.

[7] Defendants argue the Commission erred by relying upon the testimony of Dr. Currin. Specifically, Defendants argue that Dr. Currin's testimony was not sufficiently reliable under the standard set forth in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), and reiterated in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004). Defendants argue that Dr. Currin's opinion that Plaintiff's accident at work probably aggravated her lymphedema was not based upon a reliable theory because Dr. Currin did not cite any established medical techniques or review any studies establishing that a single incident can aggravate pre-existing lymphedema. Defendants also argue that Dr. Currin's testimony was legally insufficient to prove causation because his opinion was based solely on the notion of *post hoc ergo propter hoc*.

It appears that our courts have not decided whether the standard for admissibility of expert testimony set forth in *Goode* and *Howerton* applies in workers' compensation cases. However, even assuming *arguendo*, without deciding, that the *Goode* and *Howerton* standard applies, Dr. Currin's testimony was sufficiently reliable. In *Howerton*, our Supreme Court reiterated the three-part test for evaluating the admissibility of expert testimony which had been stated in *Goode*: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? . . . (2) Is the witness testifying at trial qualified as an expert in that area of testimony? . . . (3) Is the expert's testimony relevant?" *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686 (citing *Goode*, 341 N.C. at 527-29, 461 S.E.2d at 639-41).

When determining the reliability of expert testimony, the trial court should first "look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Id.* at 459, 597 S.E.2d at 687. However, where the trial court is without precedential guidance, the trial court should focus on the following nonexclusive factors of reliability: "'the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury . . . , and independent research conducted by the expert.'" *Id.* at 460, 597 S.E.2d at 687 (quoting *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990)). Our Supreme Court emphasized that "reliability is thus a preliminary, foundational inquiry into the basic methodological

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adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Id.* Therefore, our Supreme Court held: "[O]nce the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Id.* at 461, 597 S.E.2d at 688.

Dr. Currin testified that he was a board certified family practitioner who practiced at Laurinburg Family Practice from 1980 until his retirement on 6 July 2004. Over the course of his twenty-five year career, Dr. Currin treated about one hundred patients with lymphedema. However, because Dr. Currin saw his patients multiple times during his twenty-five year career, he may have seen those one hundred patients with lymphedema "a thousand times." Because of Dr. Currin's experience in treating lymphedema, we hold that Dr. Currin's expert opinion testimony was sufficiently reliable. As in *Howerton*, "any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688.

[8] Defendants also argue that Dr. Currin's testimony was legally insufficient because it was based solely upon the notion of *post hoc ergo propter hoc*. A claimant in a workers' compensation case bears the burden of proving, by a preponderance of the evidence, a causal relationship between the injury and the claimant's employment. *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361, *aff'd per curiam*, 360 N.C. 54, 619 S.E.2d 495 (2005). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself." *Id.* "[C]ould' or 'might' expert testimony [is] insufficient to support a causal connection when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 233,

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538 S.E.2d 912, 916 (2000). Moreover, “if an expert’s opinion as to causation is wholly premised on the notion of *post hoc ergo propter hoc* (after it, therefore because of it), then the expert has not provided competent record evidence of causation.” *Singletary v. N.C. Baptist Hosp.*, 174 N.C. App. 147, 154, 619 S.E.2d 888, 893 (2005) (citing *Young*, 353 N.C. at 232-33, 538 S.E.2d at 916).

In the present case, Dr. Currin repeatedly testified to a medical certainty that Plaintiff’s accident at work probably aggravated her pre-existing lymphedema. Therefore, despite Defendants’ urging, we are not faced with a situation where Dr. Currin only presented “could” or “might” testimony. Furthermore, Dr. Currin’s opinion testimony was not based solely on the notion of *post hoc ergo propter hoc*. Dr. Currin also testified that Plaintiff’s description of the accident was consistent with a trauma of the type that would be associated with the development of lymphedema in someone with Plaintiff’s medical history.

In *Young*, our Supreme Court held that the evidence on causation in that case, which was solely based upon the notion of *post hoc ergo propter hoc*, was insufficient to support the Commission’s findings of fact that the plaintiff’s fibromyalgia was caused by an accident at work. *Id.* at 233, 538 S.E.2d at 917. However, in *Young*, the plaintiff’s expert on causation testified that “fibromyalgia [is] an illness or condition of unknown etiology[,]” *id.* at 231, 538 S.E.2d at 915, and the Court pointed out that fibromyalgia is a controversial medical condition. *Id.* at 232-33, 538 S.E.2d at 916. Moreover, the plaintiff’s expert on causation acknowledged that he knew of several other potential causes of the plaintiff’s fibromyalgia, but did not pursue any testing to determine whether they were the causes of the plaintiff’s fibromyalgia. *Id.* at 231-32, 538 S.E.2d at 915-16. Unlike fibromyalgia, which was at issue in *Young*, lymphedema does not appear to be a controversial medical condition. Defendants’ expert, Dr. Paschal, testified that Plaintiff likely suffers from lymphedema. Dr. Paschal simply testified that Plaintiff’s accident at work did not aggravate her lymphedema. Also, unlike *Young*, no other potential causes for the aggravation of Plaintiff’s preexisting, but unsymptomatic lymphedema were identified in the present case. For the reasons stated above, we affirm the Commission on this issue and overrule the assignments of error grouped under this argument.

Defendants have failed to set forth argument pertaining to their remaining assignments of error, and we therefore deem them abandoned. *See* N.C.R. App. P. 28(b)(6).

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Affirmed.

Judges WYNN and McCULLOUGH concur.

MARY NICOLE BOONE VOGLER, WIDOW; MARILYN "SUE ANN" CLYMER, GUARDIAN *AD LITEM* FOR KRISTIN DAKOTA VOGLER, MINOR CHILD; AND MARK BOONE, GUARDIAN *AD LITEM* FOR MEGAN NICOLE BOONE, MINOR STEPCHILD; OF BILLY CHARLES VOGLER, DECEASED EMPLOYEE, PLAINTIFFS v. BRANCH ERECTIONS CO., INC., EMPLOYER-DEFENDANT; RELIANCE NATIONAL INSURANCE COMPANY (NOW INSOLVENT), CARRIER-DEFENDANT; NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANT; CAMBRIDGE INTEGRATED SERV., THIRD-PARTY ADMINISTRATOR; STERLING ADMINISTRATIVE SERVICES AND THE GOFF GROUP, SERVICING AGENTS

No. COA06-288

(Filed 6 February 2007)

1. Workers' Compensation— additional compensation for safety violations—statutory and policy language

The North Carolina Insurance Guaranty Association was obligated to pay an additional 10% on a workers' compensation claim where N.C.G.S. § 97-12 allowed the increase when a health or safety violation occurred, the policy which NCIGA assumed when the issuing company was declared insolvent provided that the insurer would pay the benefits required by the workers' compensation law, and the policy also included language that provided coverage for an insured's intentional failure to comply with a health and safety statute.

2. Workers' Compensation— additional compensation for willful safety violations—liability of employer

The Industrial Commission did not err by concluding that the North Carolina Insurance Guaranty Association was entitled under the plain language of a workers' compensation policy to seek reimbursement from the employer (Branch) of a 10% addition to plaintiff's compensation imposed for willful violations of OSHA regulations and paid by NCIGA.

Judge TYSON dissenting.

Appeals by defendants from an Opinion and Award entered 27 July 2005 by the Industrial Commission. Heard in the Court of Appeals 20 September 2006.

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[181 N.C. App. 457 (2007)]

*J. Randolph Ward for defendant-appellant/cross-appellee
Branch Erections, Co., Inc.*

*Nelson, Mullins, Riley & Scarborough, LLP, by Christopher
Blake, for defendant-appellee/cross-appellant North Carolina
Insurance Guaranty Association.*

BRYANT, Judge.

The North Carolina Insurance Guaranty Association (NCIGA) (defendant-appellee/cross-appellant) and Branch Erections, Co., Inc. (Branch) (defendant-appellant/cross-appellee) appeal from an Opinion and Award entered 27 July 2005 by the North Carolina Industrial Commission (Commission).

On 23 March 2000, Billy Charles Vogler (plaintiff-decedent) suffered a compensable workplace injury by accident when he fell twenty feet to the ground after being struck by a crane. Plaintiff died as a result of the injuries sustained in the accident. In *Vogler I*, the Opinion and Award of the Full Commission granting plaintiff 10% additional compensation was reversed and remanded by this Court which held the Commission “abused its discretion by declining to receive the policy as evidence and by failing to take into account the terms of the [insurance] policy [between Branch and Reliance¹].” *Vogler v. Branch Erections Co.*, 166 N.C. App. 169, 177, 601 S.E.2d 273, 278 (2004) (*Vogler I*).

The present case is before this Court on appeal by both parties from the Commission’s 27 July 2005 Opinion and Award which concluded: (1) the insurance policy between Branch and Reliance National Insurance Company provides for NCIGA to pay plaintiff the 10% increase in compensation awarded pursuant to N.C. Gen. Stat. § 97-12; and (2) NCIGA could seek reimbursement from Branch. Both defendants appeal.

NCIGA argues the Commission erred in determining NCIGA was obligated to pay the 10% additional workers’ compensation awarded to plaintiff. Branch argues the Commission erred in holding that NCIGA is entitled to seek reimbursement from Branch for the 10% additional compensation awarded to plaintiff.

1. On 3 October 2001, Reliance “was declared insolvent in an order of liquidation” and the North Carolina Insurance Guaranty Association (NCIGA) assumed its statutory obligations in connection with this claim.

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Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law. *Bondurant v. Estes Express Lines, Inc.*, 167 N.C. App. 259, 263, 606 S.E.2d 345, 348 (2004) (quotations and citations omitted). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's conclusions of law are reviewed *de novo*. *Id.* at 63, 546 S.E.2d at 139. For the reasons stated herein, we affirm the decision of the Commission.

NCIGA Appeal

[1] On appeal NCIGA argues the Commission erred in determining NCIGA was obligated to pay the additional 10% awarded to plaintiff. Specifically, NCIGA challenges the Commission's finding that the additional 10% increase to plaintiff's workers' compensation award was a "covered claim." In the alternative, NCIGA contends it should not be required to pay the additional compensation, asserting it constitutes "punitive and exemplary damages."

The purpose of the North Carolina Insurance Guaranty Association Act (Guaranty Act), N.C. Gen. Stat. § 58-48-1 *et seq.* is:

to provide a mechanism for the payment of *covered claims* under certain insurance policies, to avoid excessive delay in payment, and *to avoid financial loss to claimants or policyholders because of the insolvency of an insurer*, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

N.C. Gen. Stat. § 58-48-5 (2005) (emphasis added). All liability insurance companies licensed to conduct business in North Carolina are members of NCIGA. *See* N.C. Gen. Stat. § 58-48-25 (2005). When a member insurer becomes insolvent, NCIGA assumes responsibility for defending and paying covered claims against the insolvent company. NCIGA has a statutory liability limit of \$300,000.00. *See* N.C. Gen. Stat. § 58-48-35 (2005). Furthermore, North Carolina General Statutes, Section 97-98 provides:

No policy of insurance against liability arising under this Article shall be issued unless it contains the agreement of the insurer

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that it will promptly pay to the person entitled to same all benefits conferred by this Article

N.C. Gen. Stat. § 97-98 (2005).

In the present case, NCIGA challenges the following findings of the Commission:

11. [] The policy specifically requires the employer to be responsible for any payment in excess of the benefits regularly provided by the Workers' Compensation Act, including those imposed due to the employer's failure to comply with a health or safety law or regulation.

12. When an insurer becomes insolvent, the Guaranty Act . . . requires that NCIGA:

(1) Be obligated to the extent of the covered claims . . . [and]

(2) Be deemed the insurer to the extent of [NCIGA's] obligation on the covered claims . . . as if the insurer had not become insolvent. N.C. Gen. Stat. § 58-48-35(a)(1) and (2) (2003).

13. [] NCIGA is obligated [pursuant to the statutory definition of a covered claim] to pay claims only to the extent of a covered claim, which does not include any amount in excess of what the insolvent insurer would be required to pay.

14. The insurance policy between defendant-employer and Reliance provides in Part One, Section F, as follows:

F. Payments You [employer] Must Make You [employer] are responsible for any payments in excess of the benefits regularly provided by the workers' compensation law including those required because:

1. Of your serious and willful misconduct;

...

3. You fail to comply with a health or safety law or regulation;

15. Based upon the clear language of the insurance policy between defendant-employer and Reliance, and therefore NCIGA as the successor to Reliance, the Commission finds that the pol-

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icy provides for payment by the carrier of any 10% increase in compensation awarded pursuant to N.C. Gen. Stat. § 97-12 and for the carrier to then seek reimbursement by defendant-employer.

NCIGA challenges the Commission's conclusions:

8. [B]ased upon a clear reading of [N.C. Gen. Stat. § 97-12], the 10% additional compensation awarded . . . is *compensation* and does not constitute exemplary or punitive damages.
9. Therefore, the additional compensation is part of a covered claim and must be paid by NCIGA, but is subject to reimbursement by defendant-employer, pursuant to the terms of the workers' compensation policy.

(Emphasis in original).

NCIGA argues the Commission erred in finding plaintiff's claim met the definition of a "covered claim" as defined by N.C. Gen. Stat. § 58-48-20. A "covered claim" is:

an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars (\$50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer . . .

N.C. Gen. Stat. § 58-48-20(4) (2005); *See Bowles v. BCJ Trucking Servs.*, 172 N.C. App. 149, 153, 615 S.E.2d 724, 727 (2005); and *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 343, 445 S.E.2d 590, 599 (1994).

The Branch-Reliance insurance policy provided that the insurer "will pay promptly when due the benefits required of [Branch] by the workers' compensation law." The policy also states "terms of this insurance that conflict with the workers' compensation law are changed by this statement to conform to that law." Plaintiff's workers' compensation claim, as a result of Branches' conduct, arose out of and was within the provisions contemplated by the "Workers' Compensation and Employers' Liability Insurance Policy."² When Reliance became insolvent, NCIGA became liable to compensate plaintiff under the terms of the Branch-Reliance insurance policy. This is clearly a covered claim as contemplated by N.C.G.S. § 58-48-20 such that NCIGA was required to compensate plaintiff

2. Paragraph A of the policy states "[t]his workers' compensation insurance applies to bodily injury by accident [which] includes death."

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(claimant) in order “to avoid financial loss to claimants or policy-holders because of the insolvency of an insurer.” N.C.G.S. § 58-48-5 (2005). The N.C. Workers’ Compensation Act states “[w]hen the injury or death is caused by the willful failure of the employer to comply with any statutory requirement or any lawful order of the Commission, compensation shall be increased ten percent (10%).” N.C. Gen. Stat. § 97-12 (2005). *See Felmet v. Duke Power Co.*, 131 N.C. App. 87, 504 S.E.2d 815 (1998) (legislature intended timely recovery for workers’ compensation claimants); *see also Cabe v. Parker-Graham-Sexton, Inc.*, 202 N.C. 176, 162 S.E. 223 (1932) (holding insurer obligated to pay for employer’s wrongdoing in order “to grant certain and speedy relief to injured employees or . . . their dependents”). It is well-settled that, where “the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.” *Hyler v. GTE Prods. Co.*, 333 N.C. 258, 262, 425 S.E.2d 698, 701 (1993).

In the instant case, the Commission reviewed the Branch-Reliance insurance policy and made specific findings of fact, including the finding that the clear language of the insurance “policy provides for payment . . . of any 10% increase in compensation awarded pursuant to N.C. Gen. Stat. § 97-12. . . .” Those findings of fact, based on competent evidence in the record, support the Commission’s conclusions of law that the additional compensation is a part of a covered claim to be paid by NCIGA. This assignment of error is overruled.

NCIGA argues in the alternative that the Commission erred in finding it was obligated to pay the additional 10% compensation because such payment constituted “punitive and exemplary damages.” We are unpersuaded by NCIGA’s alternative argument.

Resolution of this issue revolves around the language used in “Section F” of the Branch-Reliance insurance policy which excludes coverage for an insured’s intentional failure to comply with a health or safety statute, and whether that language overrides the statutory requirements of section 97-12 which allows for a 10% increase in compensation when such a violation occurs. This appears to be an issue of first impression in the appellate courts of North Carolina. However, there is strong persuasive authority from the Kentucky courts which have examined this precise issue. In a case involving the identical language used in “Section F” of the Branch-Reliance insur-

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ance policy³ and a statute analogous to N.C. Gen. Stat. § 97-12, the Kentucky court held:

There is no indication that the 15% increase in compensation required by KRS 342.165(1)^[4] was intended to fall outside the framework of workers' compensation benefits. Even if the [insurance] contract did apply, we do not believe the 15% increase in compensation could be considered in "excess" of workers' compensation benefits, as provided in [Section F. of] the [] contract.

AIG/AIU Ins. Co. v. S. Akers Mining Co., 2004 Ky. App. LEXIS 338, — S.W.3d —, (Ky. Ct. App. 2004). In affirming the lower court, the Kentucky Supreme Court made clear that the Kentucky statute, similar to N.C. Gen. Stat. § 97-12, "authorizes an increase or decrease in compensation if an 'intentional failure' to comply with the safety regulation [] contributes to causing an accident, implying only that the increase or decrease serves to compensate the party that benefits from it for the effects of the opponent's misconduct." *AIG/AIU Ins. Co. v. S. Akers Mining Co.*, 192 S.W.3d 687, 689, 2006 Ky. LEXIS 8, — S.W.3d — (Ky. Jan. 19, 2006). The Kentucky Supreme Court held that "the employer's insurance carrier is liable for any increase in benefits under KRS 342.165(1) despite a contractual term to the contrary." *Id.* The court went on to acknowledge that the consequence of the 15% increase under the Kentucky statute may appear to penalize the employer or the carrier, but that, unlike other statutes where punitive damages are explicitly mentioned, the statute at issue did not explicitly mention punitive damages, only an increase in compensation.

3. In pertinent part, this language is taken from the "Part One Workers' Compensation" portion of the standard contract issued by the National Council on Compensation Insurance and approved for use in all states, except Michigan:

F. Payments You [employer] Must Make

You [employer] are responsible for any payments in excess of the benefits regularly provided by the workers' compensation law including those required because:

1. Of your serious and willful misconduct;
 - ...
 3. You fail to comply with a health or safety law or regulation;
4. The referenced Kentucky statute states:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the *compensation for which the*

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We are strongly persuaded by the reasoning of the Kentucky courts as N.C. Gen. Stat. § 97-12 is very similar to the Kentucky statute and the provision in “Section F” of the Branch-Reliance contract is the same as the provision in the Kentucky contract. While the effect of the 10% increase may appear to penalize NCIGA, § 97-12 does not explicitly mention punitive damages, but in fact says “compensation shall be increased ten percent.” The language of the insurance policy does not preclude NCIGA’s liability for the increase. NCIGA is obligated to pay the additional 10% compensation. This assignment of error is overruled.

Branch Appeal

[2] Branch claims the Commission erred in holding that NCIGA is entitled to seek reimbursement from Branch for the 10% additional compensation awarded to plaintiff for Branches’ willful violations of OSHA regulations under North Carolina statute and the terms of the Branch-Reliance policy. Where there is no ambiguity in a policy’s language, the courts must apply the plain meaning of the policy language and enforce the policy as written. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

Based on the specific findings and conclusions of the Commission, the policy expressly included the right to seek reimbursement if the insurer had to pay amounts “in excess of the benefits regularly provided by the workers’ compensation law including those required because: [] you fail to comply with a health or safety law or regulation.” Branch has received the benefits of the insurance policy as NCIGA has paid the workers’ compensation benefits to date, exclusive of the additional 10% compensation. Thus, according to the plain language of the policy the Commission correctly concluded that the “additional 10% amount is subject to reimbursement by [Branch], as provided by the insurance policy,” where Branch has been found to have wilfully violated the OSHA regulations and must therefore reimburse NCIGA for any compensation attributed to such conduct. This assignment of error is overruled.

Affirmed.

Judge LEVINSON concurs.

employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment. . . .

KRS 342.165(1) (2005) (emphasis added).

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Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion affirms the decision of the Commission and concludes: (1) "the additional compensation [under N.C. Gen. Stat. § 97-12] is a part of a covered claim to be paid by NCIGA;" (2) "the additional 10% compensation . . . [does not] constitute[] "punitive and exemplary damages;" and (3) "where Branch has been found to have wilfully violated the OSHA regulations [they] must therefore reimburse NCIGA for any compensation attributed to such conduct."

The insurance contract between Branch and Reliance provides Branch is to be responsible for "payments in excess of the benefits regularly provided by the workers' compensation law including those required [if]: 3. [Branch] fail[s] to comply with a health or safety law or regulation." Uncontested findings of fact show Branch's failure to comply with twenty OSHA regulations proximately caused decedent's death. Branch, not the Guaranty Association, is responsible for the additional ten percent compensation provided under N.C. Gen. Stat. § 97-12. I respectfully dissent.

I. Construction of Insurance Contracts

"[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Gaston County Dyeing Machine Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000); *see also Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94, 518 S.E.2d 814, 816 (1999) ("The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction."), *disc. rev. denied*, 351 N.C. 350, 542 S.E.2d 205 (2000). The language in the policy is to be construed as written "without rewriting the contract or disregarding the express language used." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). "[T]he goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Insurance Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978).

Where "the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court." *W. S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 421, 360 S.E.2d 814, 816 (1987). "The Commission's conclusions of law are reviewable *de novo*." *Arnold v. Wal-Mart Stores, Inc.*, 154 N.C. App. 482, 484, 571 S.E.2d 888, 891 (2002).

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In *Bowles v. BCJ Trucking Servs., Inc.*, this Court held the Guaranty Association “stepped into the shoes of the insurance company found to be insolvent and is deemed the insurer having ‘all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.’” 172 N.C. App. 149, 155, 615 S.E.2d 724, 728 (emphasis original) (quoting N.C. Gen. Stat. § 58-48-35(a)(2)), *disc. rev. denied*, 360 N.C. 60, 623 S.E.2d 579 (2005).

The Guaranty Association can assert all rights and defenses Reliance could have asserted under the insurance contract. “The agreement did not create a new contract for insurance coverage but solely substituted a new party[.]” *Id.* In *Bowles*, the insurance company substituted the employer in the workers’ compensation insurance contract. 172 N.C. App. at 155, 615 S.E.2d at 728.

The Guaranty Association’s liability is limited by statute. Under N.C. Gen. Stat. § 58-48-25(a)(1)-(2) (2005), the Guaranty Association shall:

(1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency, or before the policy expiration date if less than 30 days after the determination, or before the insured replaces the policy or causes its cancellation, if he does so within 30 days of the determination. This obligation includes only the amount of each covered claim that is in excess of fifty dollars (\$50.00) and is less than three hundred thousand dollars (\$300,000.00)

(2) Be deemed the insurer to the extent of the Association’s obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

A “covered claim” means:

(4) [A]n unpaid claim, including one of unearned premiums, which is in excess of fifty dollars (\$50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State.

N.C. Gen. Stat. § 58-48-20(4) (2005).

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It is uncontested that Branch and Reliance entered into an insurance contract which states:

B. [Reliance will pay]—[Reliance] will pay promptly when due the benefits required of you by the workers' compensation law.

....

F. Payments [Branch] Must Make—*[Branch is] responsible for any payments* in excess of the benefits regularly provided by the workers' compensation law including those required because:

1. *of [Branch's] serious and willful misconduct;*

....

3. *[Branch] fail[s] to comply with a health or safety law or regulation; or*

....

If [Reliance] makes any payments in excess of the benefits regularly provided by the workers' compensation law on [Branch's] behalf, [Branch] will reimburse [Reliance] promptly.

(Emphasis supplied). The Commission entered the following uncontested and binding findings of fact:

6.[on] October 3, 2001, Reliance was declared insolvent in an order of liquidation entered in Pennsylvania. Following the insolvency of Reliance, the North Carolina Insurance Guaranty Association ("NCIGA") assumed its statutory obligations in connection with this claim pursuant to the Insurance Guaranty Association Act ("Guaranty Act").

....

1. On March 23, 2000, decedent suffered a compensable injury by accident while in the course and scope of his employment with defendant-employer when a crane broke loose from its platform and fell, striking decedent and causing him to fall 20 feet to the ground. As a direct result of said injury by accident, decedent was killed.

....

3. OSHA performed an investigation of decedent's March 23, 2000 death by accident and cited defendant-employer for 20 violations of OSHA regulations, all characterized as "serious." The

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OSHA investigator was of the opinion and the Commission finds that the violations were the proximate cause of decedent's death.

4. The OSHA report indicated that defendant-employer's records showed a failure to inspect the crane turret bolts for two years prior to this incident, even though OSHA regulations require a daily inspection of the same when in use. Decedent's death was caused by the crane falling on him as he was working on a section of a communications tower erected 18 feet above ground.

5. The OSHA inspector found that the failure to have the crane and other equipment inspected resulted in defendant-employer's failure to discover worn, cracked, and rusty bolts on the turret which caused the crane to fall on decedent. The inspector further stated: "According to the crane operator he heard a snap, then the crane boom started to fall, striking the employee [decedent] on the top leg of the tower section. The csho [Safety/Health Compliance Officer] observed that the bolts holding the upper and lower portions of the turret had sheared off. Upon closer examination many bolts showed signs of rust, indicative of cracks. Turret bolts could also be turned by hand, and the csho removed twenty two bolts using no tools. Maintenance records for the crane indicated that in the last two years the crane had not been inspected. Crane operators were not trained. Operators did not inspect the crane prior to, and during use. Severity is high due to death from crushing. Probability is also high due to the continuous use of the crane. NOTE: VIOLATION WAS PROXIMATE CAUSE OF ACCIDENT."

....

8. The OSHA inspection revealed and the Commission finds that defendant-employer knew or should have been aware of the safety hazards that existed at the job site because the violations were in plain view. Defendant-employer failed to conduct inspections of the crane, rigging equipment, fall protection and general worksite conditions, which resulted in the fatality on March 23, 2000.

See State v. Watkins, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994) (findings of fact which are not excepted to are binding on appeal).

Branch and Reliance contracted and agreed that Branch would be responsible for "any payments . . . required because 1. [Branch's] serious and wilful misconduct . . . [or] 3. [Branch's] fail[ure] to com-

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ply with a health or safety law or regulation.” The Commission’s uncontested findings of fact show Branch’s twenty OSHA regulation violations proximately caused decedent’s death. The Commission properly concluded decedent is entitled to an additional 10% compensation because of Branch’s willful failure to comply with OSHA regulations. N.C. Gen. Stat. § 97-12.

Under the contract, Branch, as employer, is responsible for payments in excess of benefits regularly provided by the workers’ compensation law. The Commission erred when it concluded the “additional compensation is part of a covered claim and must be paid by NCIGA.”

II. Conclusion

The contract between Branch and Reliance plainly and unambiguously states Branch is to be responsible for excess payments because of Branch’s “serious and wilful conduct” and “fail[ure] to comply with a health or safety law or regulation.” Branch is solely responsible for the additional ten percent compensation allowed under N.C. Gen. Stat. § 97-12.

The Commission erred when it concluded “the additional compensation [provided in N.C. Gen. Stat. § 97-12] is part of a covered claim and must be paid by NCIGA.” I vote to reverse the Commission’s order. I respectfully dissent.

STATE OF NORTH CAROLINA v. WILLIE LOUIS MCLEAN

No. COA06-216

(Filed 6 February 2007)

Constitutional Law— right to impartial jury—improper comments by trial judge

The trial court erred in a conspiracy to commit armed robbery, attempted armed robbery, three counts of armed robbery, and first-degree murder case by its actions and comments regarding defense counsel both in and out of the presence of the jury, and defendant is entitled to a new trial, because the cumulative effect deprived defendant of his constitutionally guaranteed right to a fair and impartial trial.

STATE v. McLEAN

[181 N.C. App. 469 (2007)]

Appeal by Defendant from judgments entered 4 March 2005 by Judge Evelyn W. Hill in Wake County Superior Court. Heard in the Court of Appeals 31 October 2006.

Attorney General Roy Cooper, by Special Deputy Attorney General Diane A. Reeves, for the State.

Nora Henry Hargrove for Defendant-Appellant.

STEPHENSONS, Judge.

Willie Louis McLean (“Defendant”) appeals from judgments entered upon his convictions of conspiracy to commit armed robbery, attempted armed robbery, three counts of armed robbery, and first-degree murder. For the reasons stated herein, we conclude that Defendant is entitled to a new trial.

At trial, the State’s evidence tended to show the following: On 1 November 2002, crew members working maintenance with the City of Raleigh were “pitching quarters” at the shop while waiting for their shift to end. At approximately 11:30 p.m., two young men walked into the shop. The larger of the two was wearing a yellow shirt, and the other man had on a gray hooded sweatshirt. The man in the yellow shirt was firing a handgun as he came through the door and told the crew members to “give up [their] wallets.” During the robbery, Robert Saiz, a supervisor, was shot and killed as he attempted to flee through a back door. Later, Decarus Vinson, one of the robbery victims, identified Defendant’s cousin, Dwight McLean (“Dwight”), in a photographic array as the shooter. Mr. Vinson testified that the man in the gray sweatshirt kept his face covered with the hood. That individual gathered all of the wallets and took them away. Mr. Vinson said he had over \$500 in his wallet because 1 November 2002 was payday and he had cashed his check. Mr. Vinson further testified that he observed his co-workers surrender their wallets to the robbers.

In pretrial proceedings and at trial, Mr. Vinson described the individual who gathered up the wallets as being of similar weight and size as Defendant. He also testified that Defendant was the same size, relative to Dwight, as the second robber. However, none of the eyewitnesses was able to positively identify Defendant as the second robber because that individual kept his face covered.

Following a track from the crime scene, a Raleigh police officer and his K-9 dog found the discarded yellow shirt and hooded sweatshirt, which smelled like gunpowder, on the ground. The track led

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them further to the driveway area of the Timber Lake Apartment complex, where the dog lost the scent. A resident of the complex, Mr. Newkirk, testified that late on the night of 1 November 2002, he was outside talking on his cell phone when he was approached by two men who asked to use his phone. He directed them to the pay phone at the complex. Mr. Newkirk identified Dwight from a photographic lineup as the taller of the two men who approached him. He testified that Defendant's size and complexion closely resembled the other man, but he was unable to identify Defendant in the photographic lineup.

Similarly, a cab driver who picked up two young men from the Timber Lake Apartments around midnight on 1 November 2002 subsequently identified Dwight as the bigger of the two, but did not get a good look at the shorter, smaller man and did not identify Defendant as one of the two men he picked up. He took the two men to a gas station near another apartment complex where Dwight's mother lived.

Cherrie McLean, Defendant's and Dwight's cousin, testified for the State that, a few days after 1 November 2002, she drove Defendant and Dwight to Durham. Ms. McLean said that, on the way, Dwight began to cry. When she asked him what was going on, he replied that he should never have done what his uncle, Louis McLean ("Louis"), asked him to do, and that he "didn't mean to shoot the man." Ms. McLean asked Dwight what he was talking about, and he told her that Louis had asked him and Defendant to "rob his job[.]" Dwight said that Louis gave him the gun and that, while he was shooting to try to "scare people[.]" Defendant was going around picking up Louis's co-workers' wallets. He told her that Louis had had a disagreement with Robert Saiz and "wanted revenge." He also mentioned that he and Defendant got away in a cab that took them to a gas station. Ms. McLean testified that Defendant did not protest or dispute any of Dwight's statements.

Ms. McLean gave this information to a Raleigh police detective after she was arrested in January 2003. She was in jail and hoping to get out when her attorney asked her if she knew anything about the robbery and murder. After speaking with her, the attorney talked to law enforcement officers and the District Attorney's office on Ms. McLean's behalf. Ms. McLean then gave a recorded statement describing her trip to Durham with Dwight and Defendant. She subsequently entered into a plea agreement "to take care of" all the cases pending against her in Wake and Durham Counties. She received a probationary sentence in exchange for her plea.

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On cross-examination, Ms. McLean testified that after being arrested, she requested pretrial release because she had a three-year-old child and was pregnant, but her request was denied. Her attorney told her the State would not drop or reduce the charges against her because that had already been done for her in the past. After providing information about the robbery and murder, however, she was placed on pretrial release. On the same day she got out of jail, she spoke to a private investigator and told him she had been mad at Defendant when she gave the information to law enforcement authorities, that she had falsely accused him of being involved in the robbery and murder, and that she did so because of her anger at him and because she thought her accusation would help her get out of jail. Ms. McLean also agreed on cross-examination that she and Defendant did not get along and had had “run-ins” in the past.

On the basis of Ms. McLean’s recorded statement, Defendant was arrested and charged with the crimes. He voluntarily gave blood and hair samples shortly after his arrest. An agent of the State Bureau of Investigation compared a hair taken from the gray sweatshirt to a sample of both Dwight’s and Defendant’s hair, but no match was made. Another agent performed a DNA analysis of cuttings taken from the yellow shirt and the gray sweatshirt. His comparison of blood samples from Defendant and Dwight to skin cells from the cuttings established that whereas the DNA on both pieces of clothing came from more than one individual, the predominant profile on the yellow shirt came from Dwight, and the predominant profile on the gray sweatshirt matched that of Defendant. The age of the DNA on the shirts could not be determined.

Raleigh police detective Randy Miller testified that after Defendant was arrested, he stated that his uncle, Louis, had called him and asked him to rob Louis’s co-workers, but Defendant had not answered the request. Detective Miller testified further that Louis told law enforcement authorities that Dwight was the shooter, but he did not identify Defendant as being involved.

Testifying on behalf of Defendant were his father, Willie Caldwell; his father’s fiancé, Cornelia Peterson; and her daughter, Towanda Peterson. Defendant, who does not work, does not drive, and receives social security disability benefits based on a mental disability, lived with his father, as did Cornelia. All three witnesses testified that Defendant was at home on the night of 1 November 2002. Mr. Caldwell and Ms. Peterson arrived home from work about 11:00 p.m.

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to find Defendant, Ms. Peterson's two daughters, and Towanda's children there. Defendant was watching television and did not leave the house after his father got home. Towanda testified that she and her children had gone to the mall with Defendant, where he purchased a new pair of white Nike tennis shoes with his social security check that had come in the mail that day, and that they got back home around 9:00 or 10:00 p.m. Mr. Caldwell and Ms. Peterson testified that Defendant sometimes wore other people's clothes. Neither had ever seen him wear the gray sweatshirt.

None of the defense witnesses had contacted any law enforcement authorities regarding Defendant's alibi after he was arrested.

Upon Defendant's convictions on all charges, the trial judge imposed a sentence of life imprisonment without parole for the first-degree murder conviction, three consecutive sentences of 64 to 86 months for each of the armed robbery convictions, a consecutive sentence of 25 to 39 months for the conspiracy conviction, and a consecutive sentence of 64 to 86 months for the conviction of attempt to commit robbery with a dangerous weapon. Defendant appeals.

By his first assignment of error, Defendant argues that certain actions and comments of the trial judge, both in and out of the presence of the jury, deprived him of a fair trial and violated his rights to due process. Based upon a thorough review of the trial proceedings, and for the following specific reasons, we agree and, thus, remand for a new trial.

It has been repeatedly acknowledged by this Court and our Supreme Court that every criminal defendant is entitled to a trial "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Staley*, 292 N.C. 160, 161, 232 S.E.2d 680, 681 (1977) (quoting *State v. Lynch*, 279 N.C. 1, 10, 181 S.E.2d 561, 567 (1971), and *State v. Carter*, 233 N.C. 581, 583, 65 S.E.2d 9, 10 (1951)). "A trial judge occupies an esteemed position whereby 'jurors entertain great respect for [a judge's] opinion, and are easily influenced by any suggestion coming from him. As a consequence, he must abstain from conduct or language which tends to discredit or prejudice' any litigant in his courtroom." *State v. Brinkley*, 159 N.C. App. 446, 447, 583 S.E.2d 335, 337 (2003) (quoting *McNeill v. Durham County ABC Bd.*, 322 N.C. 425, 429, 368 S.E.2d 619, 622 (1988) (quoting *State v. Carter*, 233 N.C. at 581, 65 S.E.2d at 10)). Because of the exalted status jurors accord the trial judge,

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“he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. *Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel’s intelligence and what he is doing are most damaging to a fair presentation of the defense.*”

Staley, 292 N.C. at 163, 232 S.E.2d at 683 (emphasis added) (quoting *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2nd Cir. 1957)). Indeed, our Supreme Court has cautioned that “[a]ny expression as to the merits of the case, or *any* intimation of contempt for a party or for counsel may be highly deleterious to that party’s position in the eyes of the jury.” *Staley*, 292 N.C. 162, 232 S.E.2d at 682 (emphasis added). Therefore, the trial judge “should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed[] . . . to hold in his hands.” *Withers v. Lane*, 144 N.C. 184, 191-92, 56 S.E. 855, 857 (1907).

We also recognize, however, that “‘not every improper remark made by the trial judge requires a new trial. When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error.’” *Brinkley*, 159 N.C. App. at 447-48, 583 S.E.2d at 337 (quoting *State v. Summerlin*, 98 N.C. App. 167, 174, 390 S.E.2d 358, 361 (citation omitted), *disc. review denied*, 327 N.C. 143, 394 S.E.2d 183 (1990)). That is, “[i]n evaluating whether a judge’s comments cross into the realm of impermissible opinion, a totality of the circumstances test is utilized. Unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.” *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995). On the other hand, “[e]ven if it cannot be said that a remark or comment is prejudicial in itself, an examination of the record may indicate a general tone or trend of hostility or ridicule which has a cumulative effect of prejudice.” *Staley*, 292 N.C. at 165, 232 S.E.2d at 684 (citations omitted).

In this case, Defendant cites multiple examples which, he argues, establish that the trial judge “harassed and belittled” defense counsel, “stunted” cross-examination of the only witness, Ms. McLean, who identified him as being involved in the crime, “vouched for” Ms. McLean’s credibility, and “eviscerated” closing argument. While we

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find each example identified by Defendant to be a troubling indication that the trial judge too often freely abandoned her role as the impartial arbiter of the proceedings, we are persuaded that the cumulative effect of the judge's actions and comments deprived Defendant of his constitutionally guaranteed right to a fair and impartial trial. In particular, the following actions of the trial court, which occurred in front of the jury, constitute conduct or language which tended to discredit or prejudice Defendant's case:

During cross-examination of Ms. McLean, clearly the State's "star" witness in its otherwise rather tenuous case against Defendant, defense counsel sought to question her about her use of a false birth certificate to obtain identification from the Division of Motor Vehicles and, subsequently, to use the false identification she had thus obtained to buy furniture. With no objection to this line of questioning from the State, the trial judge nevertheless interrupted defense counsel, sustained her own objection to his questions, and admonished counsel as follows: "I think we've gone far enough, counsel, unless you'd like to approach the bench and tell me what the relevance is in trying another case in this court." When counsel attempted to answer the judge, she interrupted him again and said: "I said approach the bench and tell me, you don't sit out there and tell me." Following an unrecorded bench conference, defense counsel resumed his cross-examination of Ms. McLean regarding her use of a false identification and, again, with no objection to counsel's questions from the State, the trial judge interrupted counsel with the following additional admonition:

THE COURT: Sustained. We've had this conversation at the bench, Mr. Kelly. . . . We're not going to try other crimes. You know what the rules are. I've allowed you a wide latitude because the State hasn't objected, but there comes a point when the Court is going to sustain an objection that isn't there.

MR. KELLY: Can I be heard, Your Honor?

THE COURT: No[.]

Counsel continued his cross-examination of Ms. McLean regarding her prior convictions, shortly eliciting yet another reproof from the judge, unsolicited by way of objection from the State: "Mr. Kelly, you know the right way to do this. Do it the right way. Editorial remarks like saying additionally and another is not proper." After two more questions about the witness's prior larceny convictions, defense counsel once again found himself rebuked by the judge when he

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attempted to establish that the convictions to which Ms. McLean had just admitted occurred in a certain county: “Just move on to a new area. If you’re not going to ask the questions properly, just move on to a new area.” Counsel then started to ask Ms. McLean if she had been convicted of unauthorized use of a motor vehicle a second time in Johnston County, leading the judge to interrupt the question before he completed it and command: “Approach the bench. Didn’t I just say if you’re not going to ask it properly?” On neither occasion had the State objected to defense counsel’s questions. After this bench conference, the judge took over questioning of Ms. McLean regarding her prior convictions by showing her a list of prior convictions compiled by the prosecutor, asking her if she admitted committing the convictions on the list, and ending further cross-examination of Ms. McLean on the matter.

In addition to sustaining her own objections to defense counsel’s cross-examination of this State’s witness, the trial judge found it necessary to chide counsel when she ruled on objections made by the prosecutor. For example, while cross-examining Ms. McLean as to whether she had falsely accused an individual of rape, defense counsel asked her if she had “brought rape charges” against the man. The prosecutor’s objection was sustained, accompanied by the following reprimand from the judge: “Only the State of North Carolina can bring rape charges, Mr. Kelly, you know that.” Further, when counsel asked Ms. McLean about her pretrial release and the agreement she signed in connection with that release, he characterized the arrangement as follows: “[Y]ou signed your name to an agreement, you don’t have to put up any money and you get out of jail; is that right?” Once again, with no objection lodged by the State, the judge jumped in the fray anyway: “Sustained as to inaccurate description. You signed your name to an agreement, but there’s a lot in that agreement, Mr. Kelly.”

The judge continued her scolding of defense counsel outside the presence of the jury as well. For example, when he attempted to make a record of the answers of Ms. McLean to the questions that the judge would not allow him to ask in the jury’s presence, the judge demonstrated her impatience and reproach as follows:

MR. KELLY: I wanted to take some of her answers [on] the record, . . .

THE COURT [interrupting]: Mr. Kelly, the jury is waiting to go to lunch. They’re sitting in the jury room. If you’ve got something for the record, say it.

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MR. KELLY: I will do it real quick. I want to take some answers for the record. We're—

THE COURT [interrupting]: You said you wanted to be heard. I'm sitting waiting to hear you.

When defense counsel explained that the specific evidence he wanted to cover was his questions and Ms. McLean's answers regarding false and fraudulent statements related to her use of false identification, the judge heard argument from the prosecutor and denied defense counsel's request. Counsel told the court again that he wanted to put the witness's answers on the record, leading the judge to launch into a discussion of what she would not permit counsel to do with other witnesses, a topic that had not been raised by counsel. After letting Mr. Kelly know, in no uncertain terms, that "we're not going into these matters with other witnesses of yours," the judge finally turned her attention to his previous, straightforward request to put Ms. McLean's answers on the record, by stating: "You may ask this witness whatever questions you have to ask while the jury knows their [sic] out because you asked them to go out. So take your time." Plainly, the judge was telling defense counsel that the jurors, whom she had already reminded him were waiting to go to lunch, would blame him for having to wait in the jury room while he delayed their lunch by putting Ms. McLean's testimony on the record.

During his efforts to record the witness's answers to his questions about her use of false identification, the judge again sustained her own objection to a question, criticizing counsel as she did as follows: "[The witness] has certain fifth amendment rights. You might be familiar with the Fifth Amendment as a defense attorney." The judge then decided that defense counsel's questioning of the witness was over, asserting: "Let's bring the jury back. We're finished with this."

Further, the judge repeatedly interrupted defense counsel's closing argument, at one point inserting an instruction and advising the jury that she was giving them the instruction "so you have the context [for] his remarks." Upon concluding her remarks, the judge asked the jurors if they could "see the difference" between the instruction she gave and counsel's argument, even though at the point she interrupted him, he was arguing only what he contended the evidence showed regarding Ms. McLean's false statements. In addition, and more concerning, when counsel argued that Ms. McLean was "the one witness in this case with a prior record[,]," the judge interrupted and said, "*That's not true, Mr. Kelly.*" After a bench conference, counsel

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changed his argument to state that Ms. McLean was the only witness with a criminal record “in terms of the evidence of this trial.” No evidence was offered at the trial of this case that any witness other than Cherrie McLean had a prior criminal record. By telling the jury that defense counsel’s observation to that effect was “not true,” the judge clearly gave the impression that other witnesses in the case had prior criminal records. This impression could easily have extended to Defendant, particularly since he did not testify.

The State argues that whereas the trial judge “may have been short-tempered at times,” may have been “sarcastic or belittling of defense counsel,” and her conduct of the trial “was not always reserved and decorous[]”—“stylistically typical of this judge’s conduct”—the effect of her “unorthodox” style was “isolated” and, even considering her remarks and conduct cumulatively, Defendant’s trial was not unfair. We cannot agree. While, in isolation, examples of the judge’s treatment of defense counsel may not warrant a new trial for Defendant, we cannot say that, taken together, the judge’s conduct and statements did not cause defense counsel to “‘trim[] his sails to such a judicial wind as prevailed in the courtroom during this trial, and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony.’” *Staley*, 292 N.C. at 163, 232 S.E.2d at 683 (quoting *Ah Kee Eng*, 241 F.2d at 161). Because we cannot rule out such an effect on defense counsel’s representation of Defendant’s interests, Defendant is entitled to a new trial, free of partiality and prejudicial conduct.

Moreover, although we are constrained to accept “the fallacy of imputing a certainty of meaning and significance to the written word[,]” *Staley*, 292 N.C. at 166, 232 S.E.2d at 684, our close review of the written record in this case convinces us that the trial judge’s repeated, chiding words to defense counsel, in and out of the presence of the jury, created a general tone of disdain and, thereby, “[shook] the wavering balance” of the scales of justice the judge was holding in her hands. *Withers*, 144 N.C. at 191-92, 56 S.E. at 857. We are persuaded that, instead of guarding their even balance, the judge put her thumb on the scales, tipping them in the State’s favor. For this reason as well, Defendant is entitled to a new trial.

Because we reverse and remand for a new trial based on Defendant’s first assignment of error, we do not reach Defendant’s remaining assignments of error as we find it unlikely that the errors thereby argued are likely to recur.

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NEW TRIAL.

Judges WYNN and HUDSON concur.

The judges concurred in this opinion prior to 31 December 2006.

STATE OF NORTH CAROLINA v. SCOTT ROBERT ERICKSON

No. COA06-173

(Filed 6 February 2007)

1. Homicide— first-degree murder—failure to instruct on second-degree murder

The trial court did not commit plain error in a first-degree murder case by failing to give an instruction ex meru motu on second-degree murder based on alleged evidence that defendant did not have the ability to form the requisite intent to commit first-degree murder, because the State established each element of first-degree murder including evidence that: (1) during the summer of 2002, the victim expressed to several people that she was afraid defendant would harm her based on the fact she cut down his marijuana plants and removed some of his belongings; (2) defendant believed he was being told to shoot the victim and that messages from television and radio programs were telling him to return to North Carolina and kill the victim; (3) defendant returned to North Carolina, went to the victim's house, and shot her without any provocation; and (4) although a psychologist's testimony tended to establish defendant was unable to understand whether his actions were right or wrong, he did not testify that defendant was unable to plan his actions or that he lacked the ability to premeditate and deliberate.

2. Constitutional Law— right to counsel—offhand remark

The trial court did not abuse its discretion in a first-degree murder and possession of a weapon of mass destruction case by failing to grant a mistrial when the State's witness allegedly commented on defendant's invocation of his constitutional right to counsel, because: (1) the prosecutor did not elicit testimony from the agent witness regarding defendant's request to invoke his right to remain silent, but instead the agent's comment was made

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in response to defense counsel's question; (2) the prosecutor did not argue to the jury that an inference could be made regarding defendant's request for an attorney that would reflect on defendant's mental state at the time of the murder; (3) the agent's comment, taken in context, was not of such character that the jury would have concluded it was a comment on defendant's exercise of his right to counsel; (4) the agent's statement taken in context was not made to shed doubt on defendant's insanity defense, but was an attempt to explain why the agent was unable to determine when defendant's luggage was packed; (5) assuming arguendo the agent's comment was improper, the jury poll conducted by the trial court after the curative instruction was given indicated the members of the jury understood the instruction to disregard the comment and that they would in fact disregard the comment; and (6) the State presented overwhelming evidence of defendant's guilt.

3. Evidence—hearsay—state of mind exception

The trial court did not abuse its discretion in a first-degree murder case by admitting testimony regarding the victim's state of mind, because: (1) the fact that the last statements the victim made regarding her fear of defendant happened some time prior to the murder does not deprive the evidence of its probative value; (2) although defendant presented an insanity defense, the defense is unrelated to the existence or nonexistence of the elements of the criminal act, and thus, the State was required to prove each element of first-degree murder; and (3) the conversations between the victim and the witnesses related directly to the victim's fear of defendant and were admissible to show the victim's then existing state of mind at the time she made the statements.

4. Appeal and Error—preservation of issues—failure to argue

The remaining assignments of error that defendant failed to present in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal by defendant from judgment entered 23 September 2004 by Judge William Z. Wood, Jr. in Wilkes County Superior Court. Heard in the Court of Appeals 30 October 2006.

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Attorney General Roy Cooper, by Special Deputy Attorney General Neil Dalton, for the State.

Winston & Maher, by Thomas K. Maher, for defendant-appellant.

CALABRIA, Judge.

Scott Robert Erickson (“defendant”) appeals from judgment entered upon jury verdicts finding him guilty of first-degree murder and possession of a weapon of mass destruction. We find no error.

The State presented the following evidence: defendant, a Minnesota native, moved to North Carolina to live with his father, Scott Schneiderhan (“Mr. Schneiderhan”) who lived in a trailer owned by Ms. Allene Pierce (“Ms. Pierce”), the victim. The trailer was located on Ms. Pierce’s farm near her residence. Ms. Pierce allowed Mr. Schneiderhan and the defendant to live in the trailer rent-free in exchange for their help on the farm. During the spring of 2002, Ms. Pierce began having problems with Mr. Schneiderhan and defendant. Ms. Pierce discussed these problems with several people including her brother, sisters, and neighbors. Over the course of several conversations, Ms. Pierce told her friends that Mr. Schneiderhan and defendant were not completing their work as agreed and that she wanted them to leave. Ms. Pierce, however, indicated that she had not asked Mr. Schneiderhan and defendant to leave because she was afraid that defendant may harm her or her property. During the spring of 2002, Mr. Schneiderhan moved but the defendant continued to live in Ms. Pierce’s trailer without working on Ms. Pierce’s farm. During the summer of 2002, defendant also left Ms. Pierce’s trailer and returned to Minnesota.

On 13 December 2002, at approximately 9:30 a.m., the Wilkes County Sheriff’s Department received a 911 phone call from Ms. Pierce’s residence. Law enforcement and emergency personnel were dispatched to Ms. Pierce’s residence where they found Ms. Pierce lying face down on the floor of her kitchen. Later, it was determined that Ms. Pierce had been shot in the chest and that she died from the loss of blood. At approximately 10:30 a.m., on the same day, defendant arrived at the home of Ray Absher (“Mr. Absher”) and knocked on the front door. When Mr. Absher opened the door, defendant asked for a pack of cigarettes. Mr. Absher testified that the defendant did not appear to be nervous and was not acting abnormally. After Mr. Absher gave defendant a pack of cigarettes, defendant left. As the

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defendant was driving away, his car became stuck at the end of Mr. Absher's driveway. The defendant got out of his car, went back to Mr. Absher's house and asked Mr. Absher if he could leave "something" there. Mr. Absher testified that defendant had often left personal belongings at his home and he gave defendant permission to leave the item. The defendant walked back to his car and retrieved an object wrapped in a towel. Mr. Absher told defendant to take the object and place it in the back room of the basement. After the defendant placed the item in the basement, Mr. Absher drove the defendant to Robert Jones' ("Mr. Jones") home, where the defendant was staying.

That evening, police officers arrived at Mr. Absher's home and questioned him about the defendant's whereabouts, the defendant's car and whether Mr. Absher had seen the defendant with a gun. Mr. Absher responded to the officers' questions but indicated that he had not seen the defendant with a gun. After the officers left, Mr. Absher's wife reminded him that the defendant had stored an object in the basement earlier that morning. Mr. Absher retrieved the object and discovered that it was a gun. Mr. Absher immediately contacted the police. Defendant was arrested that evening at Mr. Jones' home.

Defendant was indicted for first-degree murder and possession of a weapon of mass destruction. On 9 July 2003, defendant served the State with notice of his intent to raise the defense of insanity and to introduce expert testimony on mental health issues. After two competency evaluations, defendant was discharged to the custody of the Wilkes County Sheriff's Department on 17 February 2004 as being capable to stand trial.

At trial, defendant presented the testimony of Dr. Karla de Beck ("Dr. de Beck"), a forensic psychiatrist at Dorothea Dix Hospital ("Dorothea Dix") in Raleigh, North Carolina. Pursuant to a court order, Dr. de Beck determined that defendant had schizophrenia, paranoid type, depressive disorder and a history of cannabis, cocaine and alcohol abuse. Dr. de Beck testified that, in her opinion, defendant experienced active symptoms of psychosis consistent with paranoid schizophrenia at the time of the alleged incident.

Defendant also presented the testimonies of Dr. Cindy Cottle ("Dr. Cottle") and Dr. Mark Hazelrigg ("Dr. Hazelrigg"), forensic psychologists at Dorothea Dix Hospital. Dr. Cottle and Dr. Hazelrigg examined defendant to determine whether defendant's symptoms of psychosis were malingered. Both doctors determined within a rea-

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sonable degree of psychological certainty that the defendant's symptoms of psychosis were not malingered.

Finally, defendant presented the testimony of Dr. Moira Artigues, a psychiatrist in private practice, who determined defendant was not responsible for his actions due to the severity of his schizophrenia. Defendant also presented the testimony of Dr. John Frank Warren, III ("Dr. Warren"), a licensed psychologist, who concluded that defendant's illness so impaired him at the time of the murder that he was unable to know right from wrong.

On 23 September 2004, a jury found defendant guilty of both first-degree murder and possession of a weapon of mass destruction. Wilkes County Superior Court Judge William Z. Wood, Jr. entered judgment upon jury verdicts and sentenced defendant to life imprisonment without parole in the North Carolina Department of Correction. Defendant appeals.

There was no question that defendant fired the shot that killed Ms. Pierce. The issue in this case was whether defendant was legally insane and whether he killed the victim after forming the specific intent to kill.

[1] Defendant begins by arguing that an instruction on second-degree murder should have been given, despite his failure to request it, because there was evidence that defendant did not have the ability to form the requisite intent to commit first-degree murder. Because defendant did not request an instruction on second-degree murder, we review for plain error.

"[I]n exceptional cases, where the claimed instructional error is fundamental, or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty, absence of the required instruction, even when there is no objection, will justify reversal under the plain error rule." *State v. Connell*, 127 N.C. App. 685, 691, 493 S.E.2d 292, 296 (1997) (internal quotations and citations omitted). "In order to show the existence of plain error in the trial court's charge, the defendant must establish that but for the erroneous charge the jury probably would have reached a different verdict." *Id.* "The test for determining whether the jury must be instructed on second-degree murder is whether there is any evidence in the record which would support a verdict of second-degree murder." *State v. Conaway*, 339 N.C. 487, 514, 453 S.E.2d 824, 841 (1995). "It is unquestioned that the trial judge must instruct the

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jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense.” *Id.* However, “[i]f the evidence is sufficient to fully satisfy the State’s burden of proving each and every element of the offense of murder in the first-degree, including premeditation and deliberation, and there is *no* evidence to negate these elements . . . the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.” *State v. Millsaps*, 356 N.C. 556, 560, 572 S.E.2d 767, 771 (2002) (internal quotations omitted) (emphasis in original). “Only where defendant has brought forth evidence to negate the element of premeditation and deliberation, or where the evidence is equivocal as to premeditation and deliberation, is defendant entitled to an instruction on second-degree murder.” *State v. Ingle*, 336 N.C. 617, 628, 445 S.E.2d 880, 885 (1994).

“First degree murder is defined as the intentional and unlawful killing of a human being with malice and with premeditation and deliberation.” *State v. Hornsby*, 152 N.C. App. 358, 364, 567 S.E.2d 449, 454 (2002) (internal quotations omitted). “Murder in the second degree, on the other hand, is the unlawful killing of a human being with malice but without premeditation and deliberation.” *Id.* (internal quotations omitted). “Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.” *State v. Bullock*, 326 N.C. 253, 257, 388 S.E.2d 81, 83 (1990). “Deliberation means an intention to kill executed by one in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose” *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979).

The evidence in the present case tended to show that during the summer of 2002, Ms. Pierce expressed to several people that she was afraid defendant would harm her. Also, defendant was upset with Ms. Pierce because she had taken his belongings and cut down his marijuana plants. Defendant believed he was being told to shoot Ms. Pierce and that messages from television and radio programs were telling him to return to North Carolina and kill Ms. Pierce. When defendant returned to North Carolina, he went to Ms. Pierce’s house and shot her. Further, there was no evidence that Ms. Pierce provoked defendant. The State’s evidence clearly established each element of first-degree murder and there was no evidence to negate these elements. Accordingly, the trial court did not commit plain

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error by not submitting an instruction on second-degree murder to the jury. *See Hornsby*, 152 N.C. App. at 365, 567 S.E.2d at 455 (holding an instruction on second-degree murder was not warranted when each element of first-degree murder was clearly established and the defendant's insanity defense did not negate any element).

Defendant contends that the testimony of Dr. Warren regarding defendant's mental state at the time of the crime negated the elements of premeditation and deliberation thereby requiring an instruction on second-degree murder and the failure to give such instruction was plain error. We disagree.

A careful review of the transcript reveals that Dr. Warren's testimony tended to establish defendant was unable to understand whether his actions were right or wrong. Dr. Warren testified that defendant was diagnosed with paranoid schizophrenia and that defendant's symptoms included a delusional system which affected defendant's cognitive abilities. Dr. Warren also testified that because of defendant's delusional system, he did not know the natural consequences of shooting Ms. Pierce—i.e. that Ms. Pierce would actually die. Dr. Warren testified that in defendant's delusional state, he did not understand that Ms. Pierce would in fact actually die, but because Ms. Pierce was "watching him on TV" and knew he was coming to kill her, that she would "not really be dead." Dr. Warren did not testify that defendant was unable to plan his actions or that he lacked the ability to premeditate and deliberate.

Dr. Warren's testimony established defendant's mental state at the time of the crime—that defendant was incapable of understanding whether his actions were right or wrong. However, Dr. Warren's testimony did not negate defendant's ability to premeditate and deliberate. *See Ingle*, 336 N.C. at 629, 445 S.E.2d at 886 ("The ability to distinguish between right and wrong and the ability to premeditate and deliberate are entirely different considerations."); *see also, State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988) (distinguishing between evidence presented to support an insanity defense and evidence to negate premeditation and deliberation).

In *Ingle*, our Supreme Court upheld the trial court's denial of the defendant's request for an instruction on second-degree murder. The defendant claimed the instruction was supported by expert testimony regarding his mental state at the time of the alleged crime. *Id.*, 336 N.C. at 629-30, 445 S.E.2d at 886. Justice Meyer, writing for the Court reasoned:

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Testimony that defendant lacked the ability to engage in the *higher* function of determining the moral acceptability of his actions, even if believed, does not negate or call into question his ability to plan his actions. Accordingly, such evidence does not justify the submission of an instruction on second-degree murder.

Id. (emphasis in original). As in *Ingle*, Dr. Warren's testimony, did not negate or call into question defendant's ability to plan his actions but tended to establish that defendant lacked the ability to know right from wrong. Because defendant did not present evidence that he was unable to premeditate or deliberate, an instruction on second-degree murder was not required. Accordingly, the trial court did not commit plain error and this assignment of error is overruled. *See State v. Adams*, 335 N.C. 401, 439 S.E.2d 760 (1994).

[2] Defendant next argues the trial court erred by not granting a mistrial when the State's witness, Agent Chris Laws ("Agent Laws"), commented on defendant's invocation of his constitutional right to counsel and the trial court compounded the problem by giving a curative instruction to the jury. We disagree.

"A trial court should grant a defendant's motion for mistrial only when there are improprieties in the trial so fundamental that they substantially and irreparably prejudice the defendant's case, making it impossible for the defendant to receive a fair and impartial verdict." *State v. Diehl*, 147 N.C. App. 646, 650, 557 S.E.2d 152, 155 (2001). "[T]he decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. Upchurch*, 332 N.C. 439, 453, 421 S.E.2d 577, 585 (1992) (internal quotations omitted). "[A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Barts*, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986).

During cross-examination, the following exchange took place between the defense attorney, Maitri Klinkosum ("Mr. Klinkosum"), and Agent Laws:

[Mr. Klinkosum]: In regards to his luggage, you never determined whether he simply just didn't unpack or whether they had been packed up, correct, while he was here in North Carolina?

[Agent Laws]: He asked for an attorney. I couldn't ask him that.

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Defendant argues Agent Laws' response regarding defendant's invocation of his constitutional right to counsel tainted the jury's ability to fairly assess whether defendant was mentally insane at the time of the crime. Defendant relies upon *Wainwright v. Greenfield*, 474 U.S. 284 (1986), in which the United States Supreme Court held that a defendant's invocation of his right to remain silent could not be used by the state as proof of defendant's sanity. Defendant also relies upon *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989), in which our Supreme Court held it improper for the State to comment on a defendant's silence and *State v. Shores*, 155 N.C. App. 342, 573 S.E.2d 237 (2002), in which this Court held the prosecutor's arguments and comments to the jury violated defendant's right to remain silent.

We find the decisions of *Wainwright*, *Hoyle*, and *Shores* distinguishable from the facts of this case. In each of the above cases, the prosecutor either elicited testimony regarding the defendant's invocation of his constitutional rights or argued to the jury that the defendant invoked his right to remain silent. In the case before us, the prosecutor did not elicit testimony from Agent Laws regarding defendant's request. Rather, Agent Laws' comment was made in response to the defense attorney's question. Further the prosecutor did not argue to the jury that an inference could be made regarding defendant's request for an attorney that would reflect on defendant's mental state at the time of the murder.

The facts of this case are similar to those of *State v. Hamilton*, 53 N.C. App. 740, 281 S.E.2d 680 (1981). In *Hamilton*, the State's witness responded to a question regarding how he determined the defendant was using an alias. *Id.* at 742, 281 S.E.2d at 682. While answering the question, the witnesses stated that the defendant said he did not want to talk. *Id.* We adopted the test set out in *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955), which requires us to consider whether "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment" on defendant's exercise of his right to silence. *Hamilton*, 53 N.C. App. at 744, 281 S.E.2d at 683. In so doing, we concluded that the witness' statement, taken in context, was not intended to be a comment on the defendant's invocation of his right to silence. *Id.*

Applying the test adopted in *Hamilton* to the case before us, we do not find that Agent Laws' comment, taken in context, was of such character that the jury would have concluded it was a comment on defendant's exercise of his right to counsel. As in *Hamilton*, "a jury

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would likely treat [the comment] as nothing more than an insignificant remark of little consequence." *Id.*, 53 N.C. App. at 744, 281 S.E.2d at 683.

Defendant argues that *Hamilton* is distinguishable from the present case because *Hamilton* did not involve an insanity defense. Defendant also argues that informing the jury that defendant requested an attorney when he was arrested bears directly upon the plausibility of his insanity defense. Defendant's argument is not without merit. However, taking Agent Laws' statement in context, its purpose was not to shed doubt on defendant's insanity defense but was an attempt to explain why he was unable to determine when defendant's luggage was packed. Again, taken in context, it is doubtful that the jury would have considered Agent Laws' statement to be more than an offhand remark with little implication regarding defendant's mental state at the time of the crime.

Assuming, *arguendo*, Agent Laws' comment was improper, defendant further contends that the trial court's curative instruction, given over objection, only acted to compound the effects of the comment. We disagree.

"Generally, when a trial court properly instructs jurors to disregard incompetent or objectionable evidence, any error in the admission of the evidence is cured." *Diehl*, 147 N.C. App. at 650, 557 S.E.2d at 155. "[I]n deciding whether the instruction did in fact cure any error, the crucial inquiry is into the nature of the evidence and its probable influence upon the mind of the jury in reaching a verdict as well as the probable difficulty in erasing it from the mind." *State v. Griffin*, 136 N.C. App. 531, 547-48, 525 S.E.2d 793, 805 (2000) (internal quotations omitted). Additionally, an objectionable comment may be rendered harmless beyond a reasonable doubt "[i]f the State shows overwhelming evidence of the defendant's guilt . . ." *State v. Riley*, 128 N.C. App. 265, 270, 495 S.E.2d 181, 185 (1998).

As already stated, given the context of Agent Laws' comment, the jury probably treated Agent Laws' comment as nothing more than an offhand remark. Also, the jury poll conducted by the trial court after the curative instruction was given indicated that the members of the jury understood the instruction to disregard Agent Laws' comment and would in fact disregard the comment. Finally, the State presented overwhelming evidence of defendant's guilt.

[3] Defendant's final argument is that the trial court erred by admitting testimony regarding Ms. Pierce's state of mind because it

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was irrelevant and highly prejudicial. During the guilt-innocence phase of the trial, the State presented the testimonies of Bernice Mathis, Dale Pierce, Betty Roberts, and Sydney Johnson concerning statements made by Ms. Pierce to them regarding her fear of defendant. Defendant contends that these statements were inadmissible under North Carolina Rules of Evidence Rule 803(3) because they were not statements of Ms. Pierce's mind as of the date of her death. We disagree.

Rule 803 of the North Carolina Rules of Evidence allows “[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)” to be admitted into evidence. N.C. Gen. Stat. § 8C-1, Rule 803 (2005).

Bernice Mathis (“Ms. Mathis”), Ms. Pierce’s friend, testified that during the summer of 2002, Ms. Pierce said that she was afraid of defendant. Ms. Pierce told Ms. Mathis that she heard shots being fired at the trailer and that she was afraid defendant would burn her out of her home. Dale Pierce (“Mr. Pierce”) testified that he had known Ms. Pierce and had conducted business with her for twenty-five years. Mr. Pierce testified that on one occasion approximately four months prior to defendant shooting Ms. Pierce, Ms. Pierce told him that she was afraid of defendant. Ms. Pierce told Mr. Pierce that defendant had “shot her trailer up.” After Mr. Pierce promised Ms. Pierce that he would not tell anyone, she stated, “I’m scared to run him off or call a deputy. He’ll come back and kill me.”

Betty Roberts (“Ms. Roberts”), Ms. Pierce’s friend, also testified that during the summer of 2002 Ms. Pierce told her that she was afraid of defendant and that she was afraid he would kill her cows or “burn her out.” Sidney Johnson (“Mr. Johnson”), Ms. Pierce’s nephew, testified that he visited his aunt once or twice per week and that on each occasion she told him that she was afraid of defendant. During the period of time after defendant moved from of Ms. Pierce’s trailer, Ms. Pierce told Mr. Johnson on several occasions that she was afraid defendant would come back and harm her.

“Evidence tending to show state of mind is admissible as long as the declarant’s state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value.” *State v. McHone*, 334 N.C. 627, 435 S.E.2d 296 (1993) (statements regarding defendant’s threats to victim made six months prior to murder admissible); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66

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(1990) (statements regarding victim's state of mind three weeks before her disappearance were relevant to the issue of her relationship with her husband). The witnesses' testimonies related directly to Ms. Pierce's fear of defendant and were admissible to show her then existing state of mind at the time she made the statements. *See McHone*, 334 N.C. at 637, 435 S.E.2d at 302.

Defendant further contends that the prejudicial effect of Ms. Pierce's statements outweighed any probative value because the statements were made long before the date she was murdered and the most recent statements were made during the summer of 2002.

"Whether or not to exclude evidence under Rule 403 of the Rules of Evidence is a matter within the sound discretion of the trial court and its decision will not be disturbed on appeal absent a showing of an abuse of discretion." *State v. McCray*, 342 N.C. 123, 131, 463 S.E.2d 176, 181 (1995). "Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133 (1993).

"Notwithstanding its relevancy, evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *McHone*, 334 N.C. at 638, 435 S.E.2d at 302 (citations and quotations omitted); N.C. Gen. Stat. § 8C-1, Rule 403 (2005). "Unfair prejudice has been defined as an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (internal quotations omitted).

In the case before us, Ms. Pierce told several witnesses on numerous occasions that she was afraid to ask defendant to leave because she was afraid that he may harm her. Also, Mr. Johnson testified that after defendant moved to Minnesota, Ms. Pierce continued to tell him that she was afraid defendant would return to North Carolina and harm her. The evidence tended to show that Ms. Pierce was afraid of defendant and that fear caused her to allow defendant to continue to live in her trailer even after defendant stopped working on her farm. The fact that the last statements Ms. Pierce made regarding her fear of defendant happened some time prior to the murder does not deprive the evidence of its probative value. *See McHone*, 334 N.C. at 637-38, 435 S.E.2d at 302.

Defendant also contends that because an insanity defense was presented, the only relevant evidence that should have been admitted

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was evidence that would rebut the insanity defense and that the testimony of the witnesses regarding Ms. Pierce's state of mind was irrelevant and highly prejudicial because it did not tend to rebut an insanity defense. We disagree.

"The defense [of insanity] is unrelated to the existence or non-existence of the elements of the criminal act; thus, where a defendant raises the defense of insanity, the burden remains upon the State . . . to prove . . . the existence of each element of the offense beyond a reasonable doubt." *Hornsby*, 152 N.C. App. at 366, 567 S.E.2d at 456. The State was required to present evidence to prove each element of first-degree murder. The conversations between Ms. Pierce and the witnesses related directly to Ms. Pierce's fear of defendant and were admissible to show Ms. Pierce's then existing state of mind at the time she made the statements. *See McHone*, 334 N.C. at 637, 435 S.E.2d at 302. The trial court did not abuse its discretion by admitting the witnesses' testimonies of Ms. Pierce's statements regarding her fear of the defendant.

[4] Because defendant failed to present any argument as to his remaining assignments of error, they are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). For the foregoing reasons, we find no error.

No error.

Chief Judge MARTIN and Judge TYSON concur.

STATE OF NORTH CAROLINA v. JOSE LEYVA, DEFENDANT

No. COA06-354

(Filed 6 February 2007)

1. Jury— selection—trial judge excused himself from court-room

Although the trial court erred in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by excusing himself from the courtroom during jury selection and failing to decide all questions about the competency of the jurors as required by N.C.G.S. § 15A-1211(b) by allowing the attorneys

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to stipulate to the removal of jurors for cause, defendant failed to show that he was prejudiced in any way by this error.

2. Appeal and Error— record—confidential informant—failure to seal file for appellate review

The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by failing to seal the confidential informant's file for appellate review, because: (1) the State did not request a protective order since the discovery statutes did not require the State to disclose information about the confidential informant who was not testifying at trial; and (2) the confidential informant's identity was not known.

3. Criminal Law— denial of motion for mistrial—prosecutor's reference to defendant's detainment in jail and postarrest exercise of right to silence

The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by denying defendant's motions for a mistrial based on the prosecutor's reference to defendant's detainment in jail and his postarrest exercise of his right to silence, because: (1) proper curative actions were taken by the court and no prejudicial effect resulted; (2) the incompetent evidence that defendant was incarcerated was first referenced by defendant himself, and curative instructions were given; and (3) our Supreme Court has held that so long as improper questions are not persistently repeated, the trial court's decision to sustain defense counsel's objection is sufficient to prevent any prejudicial error.

4. Evidence— hearsay—not offered for truth of matter asserted—explanation for officer's presence

The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by admitting certain testimony by two detectives even though defendant contends it constituted inadmissible hearsay, because: (1) the testimony was presented to explain the officers' presence at the pertinent locations, and it was not presented for the truth of the matter asserted; (2) no admission of hearsay occurred, and thus plain error analysis was unnecessary; and (3) in addition to the inapplicability of *United States v. Silva*, 380 F.3d 1019 (2004), cited by defendant, a Seventh Circuit ruling is not binding on the Court of Appeals.

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5. Evidence— testimony—undisclosed witness

The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by excluding a witness's testimony regarding the reliability of confidential informants, because: (1) it was within the trial court's discretion to deny defendant's request to allow an undisclosed witness to testify during the trial as either an expert or as a lay witness; and (2) the witness's potential testimony was not in the interest of justice.

Appeal by defendant from judgment entered 7 June 2005 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 November 2006.

Roy Cooper, Attorney General, by Jennie W. Hauser for the State.

Linda B. Weisel, for the defendant-appellee.

ELMORE, Judge.

On 7 June 2005, Jose Leyva (defendant) was convicted by a jury in Mecklenburg County of trafficking in cocaine by possession and trafficking in cocaine by transportation. He was sentenced to 175 to 219 months in prison. It is from this conviction that defendant appeals.

On 31 August 2004, defendant was involved in a drug deal with undercover agents of the Charlotte Mecklenburg Police Department (CMPD). On 30 August 2004, defendant met with a confidential informant working for the CMPD at Salsa's Restaurant, and Detective James Almond made an audiotape of the conversation between defendant and the informant. The informant told Detective Almond that the meeting was to discuss at least a quarter kilogram cocaine deal, and Detective Almond in turn told this information to Detective Steve Whitzel. Detective Andre Briggs testified that Detective Almond told him that the defendant "was going to deliver a half kilo to Detective [Kelly] Little and a confidential informant." On the evening of 31 August 2004, Detectives Briggs and Whitzel set up surveillance of the defendant's apartment and the apartment complex where the cocaine sale was supposed to be made.

At approximately 10:30 p.m., Detective Little, working undercover, met with defendant and two other men. Defendant, Detective

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Little and the informant walked to defendant's car and defendant tossed a McDonald's bag that had been in the front passenger seat into the back seat. Detective Little reached into the back seat and looked inside the McDonald's bag, which appeared to contain a half kilogram block of cocaine. Detective Little told defendant that "it looked good" and took the block of cocaine back to his car, accompanied by the informant and defendant. The other police detectives then arrived and arrested all three men.

Defendant contends that his convictions for trafficking cocaine should be vacated and that he is entitled to a new trial. He presents the following five arguments: (I) the trial court erroneously failed to exercise its statutory duty to decide all questions concerning the competency of jurors; (II) the trial court erroneously failed to follow its constitutional and statutory obligation to seal and preserve a confidential informant's file in the record for appellate review; (III) the trial court erroneously denied defendant's motions for a mistrial based on improper questions by the prosecutor; (IV) the trial court erroneously admitted statements by Detectives Whitzel and Briggs in violation of defendant's constitutional right to confrontation and state evidence rules; and (V) the trial court erroneously excluded defendant's expert witness, Ron Guerrette. After careful review, we find no error in defendant's trial.

I.

[1] Defendant first argues that he is entitled to a new trial because the trial judge did not decide all questions about the competency of the jurors in this case as required by North Carolina statute. Before the start of jury selection, the trial judge stated:

Counsel, I may be in and out during the jury selection. If you need me, I'll be immediately available.

If you want to excuse by stipulation, you may. That is, if you both agree that you can excuse a juror that would not count as a peremptory, count as a for cause.

Jury selection was not recorded and the transcript merely reflects that fact. The record on appeal includes a stipulation that "[d]uring unrecorded jury selection, in the Judge's absence, the parties dismissed some potential jurors for cause by stipulation of the parties." No objections were made by either party as to the jury selection process.

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North Carolina General Statute section 15A-1211(b) states that “[t]he trial judge must decide all challenges to the panel and all questions concerning the competency of jurors.” Although defendant did not object to the jury panel, “[i]n general, when ‘a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.’ *State v. Stroud*, 147 N.C. App. 549, 563, 557 S.E.2d 544, 552 (2001) (quoting *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), cert. denied, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001)). However, the North Carolina Supreme Court has held that a defendant’s assignment of error regarding improper jury panel selection is without merit when a “record reflects that defendant never challenged the jury panel selection process and never once voiced to the trial court any objection to the allegedly improper handling of the jury venires prior to the call of his case for trial before a jury.” *State v. Workman*, 344 N.C. 482, 498, 476 S.E.2d 301, 310 (1996).

In *Workman*, the defendant argued that “N.C.G.S. § 15A-1211(b) was violated because a deputy clerk of court, rather than the trial court, allegedly examined the basic qualifications of the prospective jurors.” *Id.* The North Carolina Supreme Court stated that the defendant should have challenged the jury panel by following the procedure laid out in N.C. Gen. Stat. § 15A-1211(c). *Id.* at 498-99. The statute states:

(c) The State or the defendant may challenge the jury panel. A challenge to the panel:

- (1) May be made only on the ground that the jurors were not selected or drawn according to law.
- (2) Must be in writing.
- (3) Must specify the facts constituting the ground of challenge.
- (4) Must be made and decided before any juror is examined.

If a challenge to the panel is sustained, the judge must discharge the panel.

N.C. Gen. Stat. § 15A-1211(c) (2005).

In this case, defendant did not follow the procedure outlined above, but we do not dismiss defendant’s assignment of error based on this noncompliance. Because defendant in this case specifically

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contends that the trial court failed to decide all questions concerning the competency of jurors by allowing the attorneys to stipulate about the competency of jurors and agree to individual jurors' removal for cause, his assignment of error does not require compliance with N.C. Gen. Stat. § 15A-1211(c). Although we hold that the trial judge erred by excusing himself from the courtroom during jury selection, defendant failed to show that he was prejudiced in any way by this error. Accordingly, this assignment of error is overruled.

II.

[2] Defendant next argues that the trial court erred by not sealing the confidential informant's file for appellate review. We disagree. Defendant relies upon N.C. Gen. Stat. § 15A-908(b), which states that when material is submitted for review *in camera*, "the material . . . must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal." N.C. Gen. Stat. § 15A-908(b) (2005). However, this statute governs the granting of protective orders by the trial court. Here, the State did not request a protective order because the discovery statutes did not require the State to disclose information about the confidential informant, who was not testifying at trial. *See* N.C. Gen. Stat. §§ 15A-903 and 15A-904 (showing that the identity of a confidential informant is not included in the list of items that must be made available to the State, either when produced voluntarily or as a result of defendant's motion).

Defendant also cites to *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977), for the proposition that if a trial judge makes an *in camera* inspection of a confidential informant's file and then rules against disclosure of the contents, he must "order the sealed statement placed in the record for appellate review." *Id.* at 128, 235 S.E.2d at 842. In *Hardy*, the defendant made a pretrial motion to discover a statement made by a testifying witness as well as a subsequent motion at trial to discover the same statement. The *Hardy* court held that discovery of the witness's statement at trial was not prohibited by N.C. Gen. Stat. § 15A-904(a) because the witness's identity was already known. In this case, the confidential informant's identity was not known and he was not testifying at trial.

III.

[3] In his third assignment of error, defendant argues that he is entitled to a new trial because his motions for a mistrial based on two questions asked by the prosecutor were denied by the trial court. The

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first question referenced defendant's detainment in jail and the second his post-arrest exercise of his right to silence. Defendant moved for a mistrial after each allegedly improper question, and was denied both times. The trial court did not err in denying defendant's motion for mistrial because proper curative actions were taken by the court and no prejudicial effect resulted.

During cross-examination, defendant mentioned his arrest to the jury, "Okay. I said that because when they arrested me, they beat me. And they drug me on the ground, and drug my hair. And they beat me like this." Later, in the same colloquy, the prosecutor asked, "Mr. Leyva, you had access to the officers [sic] statements in this case, didn't you?" Defendant answered, "in the moment of the arrest or in the office?" The prosecutor responded, "Since you've been detained?"

This last question, a direct response to defendant's question, is the first of the improper questions upon which defendant bases his assignments of error. Defendant objected, the jury was excused, and the trial court considered counsels' arguments. The court then denied defendant's motion for mistrial, but instructed the prosecutor to tell the witness to disregard the question once the jury returned and indicated that the court would instruct the jury. After the jury returned, the trial court instructed the jury to "disregard and strike from [its] mind the last question asked by the State."

"When the trial court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Rowsey*, 343 N.C. 603, 627, 472 S.E.2d 903, 916 (1996), cert. denied, 519 U.S. 1151, 137 L. Ed. 2d 221 (1997) (quoting *State v. Black*, 328 N.C. 191, 200, 400 S.E.2d 398, 404 (1991)). "Whether instructions can cure the prejudicial effect of such statements must depend in large measure upon the nature of the evidence and the particular circumstances of the individual case." *Id.* (quoting *State v. Hunt*, 287 N.C. 360, 374, 215 S.E.2d 40, 49 (1975)). In this case, any prejudicial effect was minimal—the incompetent evidence, that defendant was incarcerated, was first referenced by defendant himself, and curative instructions were given by the court instructing the jury not to consider the improper question.

The second statement to which defendant objects occurred during cross-examination of the defendant when the State asked defendant, "you never wrote a statement of your own to the police officers, did you?" Defense counsel objected and the court sustained the

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objection, preventing the defendant from answering and the prosecutor from asking any further questions. Defendant did not then request the court to strike the question or to give an instruction to the jury. Our Supreme Court has held that so long as improper questions are not persistently repeated, “the trial court’s decision to sustain defense counsel’s objection is sufficient to prevent any prejudicial error.” *State v. Smith*, 328 N.C. 99, 136, 400 S.E.2d. 712, 733 (1991).

IV.

[4] Defendant next argues that the trial court erroneously admitted certain testimony by Detectives Whitzel and Briggs, which defendant argues was inadmissible as hearsay. Defendant first objects to testimony by Detective Whitzel regarding Detective Whitzel’s knowledge that defendant and the confidential informant were going to meet at Salsa’s Restaurant to make a cocaine sale. In relevant part, the following testimony by Detective Whitzel occurred:

State: Had you received some information from a confidential informant earlier, regarding Mr. Leyva?

Witness: Detective Almond had.

...

State: Okay. Did you have information that the confidential informant was suppose [sic] to be at that location as well?

Witness: Yes I did.

State: And did—was he at that location?

Witness: Yes he was.

State: Was Mr. Leyva there to meet the confidential informant?

Witness: Yes he was.

State: Detective, what information did you receive from the confidential informant?

Defendant: Objection

Court: Basis.

Defendant: Hearsay. Proffered. Sixth Amendment.

The trial judge excused the jury to determine whether the question was hearsay.

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Court: Well, let's hear what he's going to say outside the presence of the jury.

Witness: I didn't receive from the informant. I received from Detective Almond that Mr. Leyva and the informant were going to meet at Salsa's Restaurant and discuss at least a quarter kilo deal of cocaine.

Court: Okay. Do you object to that?

Defendant: That's two levels of hearsay, Your Honor. And it's very prejudicial, for the reason that the informant is not going to be testifying. It is offered for the truth of the matter asserted. And this witness has no basis of knowledge of that fact that I'm aware of.

State: Your Honor, actually it's not offered for the truth of the matter asserted. It's merely offered to show why Detective Whitzel was at that specific location at that particular time.

. . .

State: Mr. Tin is alleging there was entrapment in this case, Your Honor. That's the only way the State can rebut the entrapment issue throughout this trial, is to have that information from the confidential informant.

There are no *Crawford* issues because it is not testimonial, it's not coming from the police officer.

We're not offering it for the truth of the matter asserted, merely to show why he was at that particular location at that particular date.

The judge allowed the testimony and defendant failed to object to its admission. Because defendant failed to object to the admission of this evidence and preserve for appellate review the question of its admissibility, defendant assigns and argues that the error is plain error. "In criminal cases, a question which was not preserved by objection noted at trial . . . may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(c)(4) (2005). Plain error is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), cert. denied, 485 U.S.

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1036, 99 L. Ed. 2d 912 (1988) (citing *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

Defendant argues that the admission of Detective Whitzel's testimony about the information given to Detective Almond by the confidential informant violated defendant's Sixth Amendment rights and constitutes plain error. Defendant relies on a *Crawford* argument that “[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability [of the declarant] and a prior opportunity for cross-examination” before out-of-court statements can be admitted at trial. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Defendant correctly asserts that the trial court did not make a determination that the informant was unavailable, nor did defendant have an opportunity to cross-examine informant. However, defendant incorrectly categorizes the evidence as testimonial. Here, the evidence was introduced to explain the officers' presence at Salsa's Restaurant that night, not for the truth of the matter asserted. No admission of hearsay occurred, and thus analysis of the plain error argument is unnecessary.

A later witness, Detective Briggs, testified that he participated in the surveillance of defendant's apartment at the request of Detective Almond, which request was founded on information provided by the confidential informant. When asked to explain why he was outside defendant's home, Detective Briggs responded that, “On that day, I was given information by Detective Almond that this subject was going to deliver a half kilo to Detective Little and a confidential informant.” Defendant did not object to this testimony during the trial, and so must prove the admission of Briggs' testimony was plain error. However, analysis of the plain error argument is again unnecessary because, as with the previous statement, this testimony was introduced to explain Detective Briggs' presence outside of defendant's apartment rather than the truth of the matter asserted.

Defendant also asserts that these two statements violated Rule 802 of the North Carolina Rules of Evidence because they are inadmissible hearsay. As previously articulated, the statements were admissible to explain the presence of the detectives, rather than to prove that defendant sought to sell cocaine. Defendant appears to argue that his case is similar to a Seventh Circuit case holding that “[a]llowing agents to narrate the course of their investigation, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the

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defendant's rights under the [S]ixth [A]mendment." *United States v. Silva*, 380 F.3d 1019, 1020 (7th Cir. 2004). However, the *Silva* court later states that:

There are no doubt times when the testimony regarding a tip from an informant is relevant. If a jury would not otherwise understand why an investigation targeted a particular defendant, the testimony could dispel an accusation that the officers were officious intermeddlers staking out [defendant] for nefarious purposes. No such argument was made in this case, however, and no other explanation was given why the testimony would be relevant.

Id. This situation is exactly the one at play in this case. The State specifically stated that Detective Whitzel's testimony was admissible to explain why the detective was at Salsa's Restaurant, and, had defendant objected to Detective Briggs' testimony, the State probably could have again stated that the evidence was offered to explain why defendant's house was under police surveillance. In addition to the inapplicability of *Silva* to the case at hand, a Seventh Circuit ruling is not binding on this Court.

V.

[5] In his final assignment of error, defendant argues that the trial court erred by excluding the testimony of Ron Guerrette, a witness defendant sought to have testify as an expert on the reliability of confidential informants. Defendant did not notify the State of its intent to call Mr. Guerrette as a witness until after the State had presented evidence from several CMPD detectives. Defendant claims he had not previously provided Mr. Guerrette's name to the trial court or the State during discovery because he had not reasonably expected to need an expert, but later determined one was required because he had "never heard four officers get up and talk about every informant being reliable." The trial court denied defendant's motion, because Mr. Guerrette's testimony "would be of a nature of testimony given by an expert" and "notice was not given in accordance with 15A-905(c)(2)"; the issue could have been anticipated because defendant was "aware of the use of a confidential informant"; and his testimony is not required by the interests of justice.

If the State voluntarily provides discovery to a defendant pursuant to N.C. Gen. Stat. § 15A-902(a) prior to trial, the trial court must, upon motion of the State, order the defendant to give notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial within a reasonable time prior to

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trial as specified by the court. N.C. Gen. Stat. § 15A-905(c)(2) (2005). The trial court must also order the defendant to provide to the State,

at the beginning of jury selection, a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial. . . . If there are witnesses that the defendant did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

N.C. Gen. Stat. § 15A-905(c)(3) (2005).

As correctly stated by the trial court, it was within the trial court's discretion to deny defendant's request to allow an undisclosed witness to testify during the trial, as either an expert or as a lay witness. The trial court properly determined that Mr. Guerrette's potential testimony was not in the interest of justice. Accordingly, defendant's final assignment of error is overruled.

No prejudicial error.

Chief Judge MARTIN and Judge McCULLOUGH concur.

STATE OF NORTH CAROLINA v. PERCELL WATKINS, JR., DEFENDANT

No. COA04-295-2

(Filed 6 February 2007)

1. Homicide— attempted murder—indictment—sufficiency

An indictment for "attempted murder" without allegations of specific intent, premeditation, or deliberation was not defective.

2. Search and Seizure— search of shop within curtilage—permission from woman living with defendant

The trial court did not err by concluding that a search of a shop outside of defendant's house was constitutional where the court's findings, supported by the evidence, were that the woman who gave permission for the search had lived with defendant for 13 years, officers seeking her permission had known of her status

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as a resident of the house for about three or four years and had no reason to suspect that she lacked control over the premises, and her consent was voluntary and without hesitation.

3. Evidence— defendant’s drunkenness and state of mind—no plain error

There was no plain error in an attempted murder and assault prosecution in admitting statements by the woman who lived with defendant concerning his drunkenness, state of mind, condition, and actions on the Thanksgiving Day on which the shooting occurred. Although the statements may have been admissible as corroborative of her earlier testimony, their absence would not have changed the jury’s verdict.

4. Constitutional Law— right to remain silent—exercise by defendant—officer’s testimony—not plain error

There was no plain error in a prosecution for attempted murder and assault in the admission of testimony from the arresting officer about defendant’s exercise of his right to remain silent. The testimony was incidental to the officer’s overall testimony and it is doubtful that the jury assigned it heavy weight.

5. Evidence— witness to shooting—defendant heard, not seen—testimony rationally related to perception of event

There was no error in allowing the victim of an assault and attempted murder to testify that he was shot by defendant, even though he did not see defendant shoot him. The victim, defendant’s uncle, heard defendant’s voice during the shooting and had sufficient personal knowledge to identify him.

6. Homicide— attempted murder—defendant as perpetrator—evidence sufficient

There was sufficient evidence, in the light most favorable to the State, that defendant was the perpetrator of a shooting, and the court did not err by denying defendant’s motion to dismiss a charge of attempted murder.

7. Homicide— attempted murder—premeditation and deliberation—evidence sufficient

The evidence was sufficient to establish premeditation and deliberation in a prosecution for attempted murder, taken in the light most favorable to the State.

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On remand by order of the Supreme Court of North Carolina filed 3 November 2005 to reconsider the unanimous decision of the Court of Appeals, *State v. Watkins*, 169 N.C. App. 518, 610 S.E.2d 746 (2005), in light of the decision of the North Carolina Supreme Court in *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496 (2005). Appeal by defendant from judgment entered 29 August 2003 by Judge W. Osmond Smith, III, in Caswell County Superior Court. Originally heard in the Court of Appeals 16 November 2004. Heard on remand 1 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Philip A. Lehman, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

ELMORE, Judge.

This appeal arises out of defendant's convictions of attempted murder and assault with a deadly weapon with intent to kill inflicting serious injury. The North Carolina Supreme Court has remanded this case for reconsideration in light of *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496 (2005). This opinion supersedes our earlier opinion reported at *State v. Watkins*, 169 N.C. App. 518, 610 S.E.2d 746 (2005). Upon reconsideration, we find no error in defendant's trial.

Defendant was indicted on 9 April 2002 for attempted murder and on 13 May 2003 for assault with a deadly weapon with intent to kill inflicting serious injury. Following several days of trial, on 29 August 2003 a jury found defendant guilty of both crimes.

I.

The events giving rise to these convictions occurred on 22 November 2001, which was Thanksgiving Day. Defendant was living in a house located on a large family farm in rural Caswell County. Other members of defendant's family lived in separate houses on the farm, including the victim, Walter Bigelow (Bigelow), who was defendant's uncle. On Thanksgiving morning, defendant, Bigelow, and two other friends met at Bigelow's house and began drinking gin, beer, and other liquor. After drinking for several hours, the men went to the home of a friend to see his new puppies. Defendant was bitten by the mother dog after he took off his shirt and attacked the dog.

Following defendant and Bigelow's return to Bigelow's house, defendant wanted to continue drinking and entered the house against

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Bigelow's wishes. While he was inside, defendant stumbled into Bigelow's television and broke the screen. During the scuffle that followed, defendant pulled out a knife. Bigelow kicked the knife out of defendant's hand and threatened to call the police. Defendant then walked out into Bigelow's yard and eventually left in his truck after backing into Bigelow's fence.

At about 2:30 p.m. the same day, Bigelow and his brother, Huston Bigelow (Huston), were walking near their mother's house when Bigelow was struck in the shoulder by two gunshots. As he fell to the ground, he heard defendant yell, "I got one of the SOBs." Huston testified that after additional shots were fired, he heard defendant yell, "I got one now and I got one more to go."

Officer Clayton Myers of the Caswell County Sheriff's Department arrived shortly after the shooting and interviewed Donita Riley (Riley), defendant's girlfriend. Officer Myers testified that during their conversation, Riley said defendant had left his home earlier with a scoped rifle to go hunting. As part of his investigation, Officer Myers called in a bloodhound to search the area where the shots had likely been fired. The bloodhound led the officers to a piece of camouflage cloth hanging from a barbed wire fence. From there, the bloodhound followed a trail to defendant's house.

During the investigation, officers asked Riley, who lived in defendant's house, for permission to enter a shop building located near the house. Riley initially refused, but she gave officers a key to the shed after they told her they would get a warrant and tear down the door. At that time, Riley also signed a form stating that she consented to the search. Inside the building, officers found a vehicle that defendant was working on, along with a .22 rifle and bullets on the floorboard. In addition, when officers asked Riley for defendant's camouflage pants, she provided a pair with a missing swatch of cloth. Officers determined that the swatch of cloth recovered from the barbed wire fence perfectly matched the hole in defendant's pants.

II.

[1] In his first assignment of error, defendant contends that the indictment for "attempted murder" is defective since it lacks allegations that defendant acted with the specific intent to kill, premeditation, or deliberation. In light of our Supreme Court's decision in *Jones*, which held that "the indictment in the instant case comports with both statutory and constitutional requirements," this assignment of error is without merit. 359 N.C. at 839, 616 S.E.2d at 500.

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III.

[2] Defendant next argues that the search of the shop outside of his house was unconstitutional, and the evidence obtained therein should have been suppressed. Specifically, defendant argues that Riley did not have the apparent authority to authorize the search and did not provide valid consent for the search. When reviewing a trial court's ruling on a motion to suppress, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000) (internal quotations omitted), cert. denied, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001); see also *State v. Barnett*, 307 N.C. 608, 613, 300 S.E.2d 340, 343 (1983).

Resolving any conflict within the evidence, the trial court found that Riley had been defendant's girlfriend for 13 years and had resided in defendant's home for the entire time. Further, the trial court found that the officers seeking permission had known for approximately three to four years of Riley's status as a resident of the home, and that officers had no reason to suspect she did not have control over the premises, including the shop that was determined to be located within the curtilage of the home. Notably, the trial court found that Riley's consent was voluntary and without hesitation. Despite some evidence to the contrary, we see no reason to determine that these findings were not supported by the evidence.

"Once this Court concludes that the trial court's findings of fact are supported by the evidence, then this Court's next task 'is to determine whether the trial court's conclusion[s] of law [are] supported by the findings.' " *Brewington*, 352 N.C. at 498-99, 532 S.E.2d at 502 (quoting *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000)). This Court has previously determined that officers may rely on the consent of third parties who have apparent control over the area requested to be searched. See *State v. Jones*, 161 N.C. App. 615, 620, 589 S.E.2d 374, 377 (2003) ("One who shares a house or room or auto with another understands that the partner, may invite strangers[, and that his] privacy is not absolute, but contingent in large measure on the decisions of another. Decisions of either person define the extent of the privacy involved . . ."); see also *State v. Garner*, 340 N.C. 573, 592, 459 S.E.2d 718, 728 (1995) ("A third party may give permission to search where the third party possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected.") (internal quotations omitted). Based on its findings, the

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trial court did not err in determining that the search and subsequent seizure of property did not offend the Constitution.

IV.

Defendant's next three assignments of error all deal with the alleged erroneous admission of evidence. Since defendant did not object to any of these admissions, we review them for plain error. Under this standard of review, "a defendant has the burden of showing: (i) that a different result probably would have been reached but for the error; or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *State v. Jones*, 358 N.C. 330, 346, 595 S.E.2d 124, 135 (2004) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

[3] Defendant first contends that the trial court erred by admitting statements by Riley through the testimony of Officer Myers and Officer Eugene Riddick, another officer with the Caswell County Sheriff's Office investigating the shooting. The officers testified that Riley told them on 22 November 2001 that defendant came home to get a long gun with a scope, telling her that he was going hunting. Reporting from their notes, they further testified that she told them defendant was drunk, irate, bleeding from the face, and that he fell out the door. The officers also noted that Riley had told them that defendant and Bigelow did not get along and that defendant was becoming more uncontrollable.

The State argues that Riley's statements were corroborative of her earlier testimony where she described for the jury a substantially similar course of events. While we may be inclined to find that Riley's statements were corroborative of her earlier testimony, and thus admissible, we are convinced that the absence of these statements would not have changed the jury's verdict. See *State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 793-94 (1987) (discussing corroborative testimony). The jury heard evidence of an earlier fight between defendant and Bigelow; positive voice identification of defendant as the shooter by two people who had known him his whole life; the fact that police had tracked defendant from the scene of the shooting and were able to connect the pants he was wearing to cloth found at the scene; and that defendant had a long rifle in his truck. Thus, this assignment of error is overruled.

[4] Next, defendant contends that the trial court erred in admitting testimony that at various times he declined to make a statement

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to investigators. We disagree. At trial, Officer Myers testified about his interaction with defendant during defendant's arrest. He said that defendant had been drinking, was found hiding in a shower, and charged at an officer once he was discovered. The State then asked Officer Myers questions regarding defendant's demeanor following his arrest. It was while answering these questions that Officer Myers described instances in which defendant refused to make a statement.

A defendant has the right to remain silent, and the State cannot use his exercise of that right as evidence that he is guilty. *State v. Ladd*, 308 N.C. 272, 283, 302 S.E.2d 164, 171 (1983) ("We have consistently held that the State may not introduce evidence that a defendant exercised his Fifth Amendment right to remain silent."). Nonetheless, when reviewed for plain error, a witness's incidental testimony that a defendant exercised his right to silence may be a *de minimis* violation and not prejudicial. See *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997).

Under these circumstances, Officer Myers's testimony regarding defendant's exercise of his right to silence was incidental to Myers's testimony in its entirety. It is doubtful that the jury assigned heavy weight to defendant's exercise of his right to silence in light of the evidence against him. Accordingly, we find that no error occurred at trial.

[5] Concluding our plain error review, defendant states that the trial court erred by admitting Bigelow's testimony that it was defendant who shot him. We disagree. Rule 602 of the North Carolina Rules of Evidence does provide that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." N.C. Gen. Stat. § 8C-1, Rule 602 (2003). Yet, the Rule's official commentary states that "[p]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." N.C. Gen. Stat. § 8C-1, Rule 602 (2003); see also *State v. Poag*, 159 N.C. App. 312, 323, 583 S.E.2d 661, 669 (2003). Although Bigelow did not see defendant shoot him, his testimony was based on what he perceived as the shooting occurred. In particular, Bigelow testified that he heard defendant shout, "I got one of the SOBs" while he was falling. Bigelow, as defendant's uncle, was certain it was defendant's voice because he heard defendant's voice "all the time." As confirmation of Bigelow's testimony, Huston, Bigelow's brother, testified that he also heard defendant's voice shortly after the shooting and that he had known

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defendant “since the day he was born.” As a result, we conclude that Walter Bigelow had sufficient personal knowledge to identify defendant and that his opinion was rationally based on his perception of the shooting. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2003) (opinion testimony is “limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.”).

VI.

In defendant’s final two assignments of error, he asserts that the State presented insufficient evidence to (1) identify him as the shooter, and (2) establish premeditation and deliberation.

When a defendant moves for dismissal, “the trial court [must] determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). Substantial evidence is that evidence which “‘a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). In determining whether the State’s evidence is substantial, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *Id.* (citing *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)).

[6] In the light most favorable to the State, we conclude that there was ample evidence for the jury to determine that defendant was the one that shot Walter Bigelow. In particular, the evidence showed that defendant and Bigelow fought with each other before the shooting and that defendant pulled a knife on Bigelow. The State also showed that after the fight, defendant sat in his truck and pointed a gun toward Bigelow’s house. Both Bigelow and Huston identified defendant’s voice as the voice they heard when the shooting occurred. In addition, Riley testified that she saw defendant leave shortly after 2:00 p.m. in his truck. Finally, when officers searched defendant’s shop building, they found a .22 rifle and bullets. Based on this evidence, we conclude that the trial court did not err in denying defendant’s motion to dismiss.

[7] Defendant also argues that the evidence was insufficient to establish premeditation or deliberation. Our Supreme Court has stated that

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premeditation “means that the act is thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation.” *State v. Jones*, 342 N.C. 628, 630, 467 S.E.2d 233, 234 (1996). The Court has also defined deliberation as “an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose . . .” *State v. Wise*, 225 N.C. 746, 749, 36 S.E.2d 230, 232 (1945) (internal quotations omitted).

To determine whether evidence shows premeditation and deliberation, a court should consider the following factors: “(1) lack of provocation by the deceased; (2) conduct and statements of the defendant before and after the killing; and (3) ‘ill-will or previous difficulty between the parties.’” *State v. Hood*, 332 N.C. 611, 622, 422 S.E.2d 679, 685 (1992) (quoting *State v. Williams*, 308 N.C. 47, 69, 301 S.E.2d 335, 349 (1983)).

Taken in the light most favorable to the State, evidence at trial tended to show that defendant entered Bigelow’s house without his permission, a fight resulted when defendant broke Bigelow’s television, and defendant pulled a knife on Bigelow. Riley testified that ill will had developed between defendant and Bigelow. Defendant left his house with a gun in his truck and after shooting Bigelow in the shoulder yelled out, “I got one now and I got one more to go.” There is more than ample evidence that a jury could determine deliberation and premeditation beyond a reasonable doubt. Thus, defendant’s final assignment of error is overruled.

V.

For the foregoing reasons, we conclude that there was no error regarding defendant’s trial.

No error.

Judges WYNN and HUDSON concur.

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[181 N.C. App. 511 (2007)]

JAMES A. BURGIN, PLAINTIFF v. WILLARD RAY OWEN AND WIFE
ARIMELLA H. OWEN, DEFENDANTS

No. COA06-450

(Filed 6 February 2007)

Husband and Wife; Vendor and Purchaser— contract to sell entirety property—signature of husband—absence of written authorization by wife

A written contract to sell realty owned by defendants as tenants by the entirety was unenforceable where the complaint shows that the contract was signed only by defendant husband, and there was no indication that defendant wife provided the husband with written authority to act on her behalf. N.C.G.S. § 39-13.6.

Judge TYSON dissenting.

Appeal by plaintiff from an order entered 9 January 2006 by Judge Franklin F. Lanier in Harnett County Superior Court. Heard in the Court of Appeals 18 October 2006.

Bain, Buzzard & McRae, LLP, by Edgar R. Bain and L. Stacy Weaver, III, for plaintiff-appellant.

Christopher L. Carr for defendant-appellees.

BRYANT, Judge.

James A. Burgin (plaintiff) appeals from a 9 January 2006 order granting Willard Ray and Arimella H. Owens' (defendants') 12(b)(6) motion to dismiss plaintiff's complaint and canceling the lis pendens attached to defendants' real property.

Defendants are owners of the subject property as tenants by the entirety, per deed recorded at Book 852, Page 533 Harnett County Registry. Defendant Willard Owen and plaintiff agreed on a purchase price of \$53,000.00 for plaintiff to buy the subject property from defendants. On 26 April 2005, an Offer to Purchase and Contract was executed. The Offer to Purchase and Contract was signed by plaintiff and Willard Owen. Subsequently, plaintiff employed a real estate attorney to perform the title work and prepare a deed for closing. On 24 August 2005, the date scheduled for the real estate closing, Willard

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Owen delivered a letter to plaintiff stating he would not sell the subject property.

Plaintiff commenced this action on 26 August 2005 against defendants and on 29 August 2005 filed a Notice of Lis Pendens on defendants' subject property. On 9 January 2005, the trial court entered an order dismissing plaintiff's complaint for failure to state a claim upon which relief may be granted and canceling the lis pendens. From this order, plaintiff appeals.

The dispositive issue is whether the trial court erred in granting defendants' 12(b)(6) motion for failure to state a claim upon which relief may be granted. Plaintiff contends he has "sufficiently plead two good causes of action" for specific performance and breach of contract. We disagree.

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. *Country Club of Johnston County, Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). On a motion to dismiss, the complaint's material factual allegations are taken as true. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001). Dismissal is proper "when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). On appeal of a 12(b)(6) motion to dismiss, this Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177, N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation omitted); *see also McLamb v. T.P. Inc.*, 173 N.C. App. 586, 588, 619 S.E.2d 577, 580 (2005) (holding trial court properly dismissed pursuant to 12(b)(6) plaintiff's claim where plaintiff did not allege existence of a valid option contract).

North Carolina General Statutes, Section 39-13.6. entitled "Control of real property held in tenancy by the entirety" states:

- (a) A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held

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by them in tenancy by the entirety. **Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse.** This section shall not be construed to require the spouse's joinder where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, or G.S. 52-10.

N.C.G.S. § 39-13.6 (a) (2005) (emphasis added). Pursuant to N.C.G.S. § 39-13.6, absent written authorized agency of a spouse, tenants by the entirety cannot be the subject of a complaint for specific performance, or breach of contract as to real property unless the Offer to Purchase and Contract is signed by both spouses. *See* N.C.G.S. § 39-13.6 (2005). This statute gives married women equal rights to use and control and obtain income from property held as entireties.

In this case, plaintiff alleges in his complaint that at the time the Offer to Purchase and Contract was signed, Willard Owen stated that he was the agent for his wife, Arimella, and therefore she did not need to sign the contract to execute the sale. Plaintiff further alleges Willard Owen stated this agency relationship existed "at all time herein and [Willard Owen] was acting within the scope of his authority as agent of his wife at the time of signing of the contract." Taking these allegations as true, the complaint on its face reveals that no law supports plaintiff's claim for specific performance or breach of contract. Here, the complaint shows the husband was the only seller who signed the Offer to Purchase and Contract; and there was no indication that the wife provided the husband with written authority to act on her behalf.¹ We hold plaintiff's complaint failed to state a legally sufficient claim and therefore affirm the trial court's order granting defendants' motion to dismiss and canceling the lis pendens attached to the subject property.

Affirmed.

Judge LEVINSON concurs.

-
1. Defendants, in their answer, deny plaintiff's allegations:

Defendant Willard Ray Owen had no authority to sign the [Offer to Purchase] on her behalf, and further no signature of the Defendant Arimella H. Owen was affixed to the Offer to Purchase by any person, at any time. The defendant Willard Ray Owen specifically denies making any representations to the plaintiff regarding being an agent for his wife, or regarding the requirement that she sign the Offer.

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Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The majority's opinion holds "plaintiff's complaint failed to state a legally sufficient claim and . . . affirm[s] the trial court's order granting defendants' [Rule 12(b)(6)] motion to dismiss and canceling the lis pendens attached to the subject property." Taking the allegations in plaintiff's complaint as true, his allegations state a claim for which relief can be granted to survive defendants' Rule 12(b)(6) motion to dismiss. I vote to reverse the trial court's order and respectfully dissent.

I. Standard of Review

Our Supreme Court has stated:

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. A complaint may be dismissed on motion filed under Rule 12 (b) (6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged *appears on the face of the complaint* and where allegations contained therein are sufficient to give a defendant notice of the nature and basis of plaintiffs' claim so as to enable him to answer and prepare for trial.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981) (internal citations omitted) (emphasis supplied).

This Court has stated:

[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. In analyzing the sufficiency of the complaint, the complaint must be liberally construed.

Dixon v. Stuart, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987) (internal citations omitted).

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II. Motion to Dismiss

Plaintiff asserts he properly alleged a claim for breach of contract for sale of real property and entitlement to specific performance, and argues the trial court erred by granting defendants' Rule 12(b)(6) motion to dismiss. I agree.

"The elements of breach of contract are (1) the existence of a valid contract and (2) breach of the terms of the contract." *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003). "[S]pecific performance is a proper remedy for enforcement of [a contract] to purchase real estate." *Rainbow Props. v. Wilkinson*, 147 N.C. App. 520, 523, 556 S.E.2d 11, 14 (2001). Where real property is the subject to the parties' agreement, either party may seek specific performance of the executory contract without showing the inadequacy of the legal remedy. *Deans v. Layton*, 89 N.C. App. 358, 371, 366 S.E.2d 560, 568, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 276 (1988).

A. Statute of Frauds

A contract for the sale of real property must satisfy the statute of frauds. N.C. Gen. Stat. § 22-2 (2005) states:

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and *signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized*.

(Emphasis supplied). Our Supreme Court has stated:

In various decisions construing the statute, it is held that *the party to be charged is the one against whom relief is sought; and if the contract is sufficient to bind him, he can be proceeded against though the other could not be held, because as to him the statute is not sufficiently complied with*. As expressed in *Mizell, Jr. v. Burnett*, 49 N.C. 249: Under the statute of frauds, a contract in writing to sell land, signed by the vendor, is good against him, although the correlative obligation to pay the price is not in writing and cannot be enforced against the purchaser.

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Lewis v. Murray, 177 N.C. 17, 19, 97 S.E. 750, 751 (1919) (emphasis supplied).

In *Brooks Distributing Co. v. Pugh*, our Supreme Court reversed and adopted *per curiam* the rationale of Judge Cozort's dissenting opinion which states in relevant part:

It is inappropriate to consider, for purposes of a motion under 12(b)(6), whether the contract fails to comport with the statute of frauds, because the defense that the statute of frauds bars enforcement of a contract is an affirmative defense that can only be raised by answer or reply.

91 N.C. App. 715, 723-24, 373 S.E.2d 300, 305 (Cozort, J., dissenting) (emphasis supplied), *rev'd per curiam*, 324 N.C. 326, 378 S.E.2d 31 (1989). The statute of frauds or other statutory defenses are affirmative defenses, which "can only be raised by answer or reply" and cannot sustain a legal basis to affirm the trial court's grant of defendants' Rule 12(b)(6) motion to dismiss. *Id*; N.C. Gen. Stat. § 1A-1, Rule 8(c) (2005).

B. Agent of "Party to be Charged"

In addition, if agent of the party "to be charged" signs the contract for the purchase of real property, the contract will be enforceable against the principal whether present or not. *Blacknall v. Parish*, 59 N.C. 70, 72 (1860); *see also* N.C. Gen. Stat. § 22-2 ("or by some other person by him thereto lawfully authorized").

In *Reichler v. Tillman*, this Court reviewed facts and allegations very similar to those at bar and held:

[U]nder the pleadings in this case, in which plaintiffs alleged and defendants denied that plaintiffs entered into a binding contract with both defendants, plaintiffs are free to offer such evidence as they may have to show that the husband-defendant was authorized by his wife to act as her agent to contract to sell the lands belonging to both as tenants by the entirety. There was no necessity that plaintiffs allege that the contract was executed by the feme defendant through an agent.

21 N.C. App. 38, 41, 203 S.E.2d 68, 70-71 (1974). Judge Parker (now Chief Justice), joined by Judges (later Justices) Britt and Vaughan unanimously held the plaintiffs' allegations of breach of contract and for specific performance were sufficient to survive a Rule 12(c) motion for judgment on the pleadings when the plaintiffs alleged they

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“entered into a binding contract with defendants” for the purchase of the land, even though the “written ‘memorandum of said contract’ which was incorporated by reference into the complaint made no reference to the feme defendant and was not signed by her.” *Id.* at 40, 203 S.E.2d at 70.

In so ruling, the Court quoted from *Lewis v. Allred*, 249 N.C. 486, 489, 106 S.E.2d 689, 692 (1959), and stated:

The owner of real estate may sell such property through an agent, and when so acting the owner is not required to sign the agreement or to communicate with the purchaser. Moreover, the authority of a duly authorized agent to contract to convey lands need not be in writing under the statute of frauds. The agent may sign the contract to sell and convey in his own name or in the name of his principal or principals. Furthermore, the authority of an agent to sell the lands of another may be shown *aliunde* or by parol. *Hargrove v. Adcock, supra.*

Reichler, 21 N.C. App. at 41, 203 S.E.2d at 70 (citations omitted).

Here, plaintiff’s complaint alleged:

4. On April 26, 2005, an Offer to Purchase and Contract was entered into between the Plaintiff and the Defendants, and a copy of such contract to purchase is attached hereto marked *Exhibit A* and incorporated herein by reference to the same extent as if set forth herein in full. At the time of the execution of the Offer to Purchase and Contract, Defendant Willard Ray Owen stated that he was the agent for his wife and that she did not need to sign the contract and agreement which is attached hereto as *Exhibit A*.

....

10. Defendant Willard Ray Owen was acting as the agent of his wife, Arimella H. Owen, at all times herein alleged and was acting within his scope of authority as agent of his wife at the time of the signing of the contract which is attached hereto as *Exhibit A*.

Taking plaintiff’s allegations as true, as required under a Rule 12(b)(6) motion, this complaint properly alleged the elements of breach of contract for the sale of real property. *Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002). The majority’s opinion correctly recognizes on a motion to dismiss, the complaint’s material factual alle-

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gations are taken as true and liberally construed in plaintiff's favor. *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001).

It is undisputed that defendant Willard Ray Owen an owner signed the contract as seller. Plaintiff alleges defendant, Willard Ray Owen, also signed the contract as the agent for his wife, Arimella H. Owen. Whether that agent's authority is oral or written is immaterial at this stage of the proceeding. Defendant cannot assert any defenses on its Rule 12(b)(6) motion. The court must consider "as true" plaintiff's allegation that defendant, Willard Ray Owen, signed the contract as agent for his wife. Plaintiff alleged both defendants signed the contract and properly pled all required elements for breach of contract and entitlement to a remedy for specific performance. Plaintiff is entitled to offer proof, through discovery, affidavit, or testimony, to prove his allegations of agency. The trial court erred by granting defendants' Rule 12(b)(6) motion and dismissing plaintiff's claims.

III. Conclusion

Plaintiff properly pled a claim for breach of contract for the sale of real property and entitlement to specific performance of defendants' contractual duty to convey. Under clearly established precedents, the trial court could not consider any statutory or affirmative defenses on defendants' Rule 12(b)(6) motion and was limited to ruling on whether plaintiff stated "a claim upon which relief can be granted." *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241; N.C.R. Civ. P. 12(b)(6). The trial court erred when it granted defendants' Rule 12(b)(6) motion to dismiss. I vote to reverse the trial court's order and remand for further proceedings. I respectfully dissent.



IN THE MATTER OF: W.L.M. & B.J.M., MINOR CHILDREN

No. COA06-834

(Filed 6 February 2007)

1. Appeal and Error— preservation of issues—failure to assign error

Respondent mother's failure to assign error to any of the trial court's findings of fact in a termination of parental rights case makes the findings binding on appeal.

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2. Termination of Parental Rights— subject matter jurisdiction—failure to comply with time limits—failure to show prejudice

The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on its failure to comply with the time limits set forth in N.C.G.S. § 7B-1109, because: (1) each continuance by the trial court was necessary in order for all the essential parties to be present and to provide testimony and evidence at the termination hearing; (2) at no time did respondent object to any delay or continuance; and (3) respondent failed to provide any argument as to how she or the children were specifically prejudiced by the delay.

3. Termination of Parental Rights— judicial notice—prior orders and various court reports in juveniles' underlying case files

The trial court did not err in a termination of parental rights case by taking judicial notice of the prior orders and various court reports in the juveniles' underlying case files, because: (1) respondent waived appellate review of this issue as to two of the juveniles by failing to object; (2) the Court of Appeals has repeatedly held that a trial court may take judicial notice of earlier proceedings in the same case; (3) the trial court is presumed to disregard any incompetent evidence; (4) respondent has neither demonstrated how she was prejudiced, nor has she pointed to any findings of fact or conclusions of law which were reached impermissibly due to a reliance on the underlying files; and (5) there was nothing in the record indicating the trial court failed to conduct an independent determination of the facts and evidence warranting termination of respondent's parental rights.

4. Termination of Parental Rights— subject matter jurisdiction—untimely motion to terminate parental rights

The trial court did not lack subject matter jurisdiction in a termination of parental rights case based upon the untimeliness under N.C.G.S. § 7B-907 of the motion to terminate respondent's parental rights, because: (1) the time limitation under N.C.G.S. § 7B-907 is directory rather than mandatory, and thus, not jurisdictional; and (2) respondent failed to present any argument as to how the delay prejudiced her or any other party to the matter.

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5. Termination of Parental Rights— subject matter jurisdiction—failure to attach order conferring custody of children upon DSS

The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on the fact that no order conferring custody of the children upon DSS was attached to the motion, and the motion to terminate respondent's parental rights was not void ab initio, because: (1) the error of failing to attach a custody order may be remedied by making the custody order a part of the record before the trial court; (2) there was no indication that respondent was unaware of the placement of custody of the two children at any time during the pendency of this matter; (3) the motion to terminate respondent's parental rights incorporated by reference the juvenile file and custody order in effect when the motion was filed; and (4) respondent was not prejudiced by the lack of a custody order being attached to the motion.

Appeal by respondent-mother from judgments entered 22 November 2005 and 5 December 2005 by Judge L. Suzanne Owsley in Caldwell County District Court. Heard in the Court of Appeals 11 January 2007.

Lauren Vaughan, for Caldwell County Department of Social Services, for petitioner-appellee.

Parker Poe Adams & Bernstein L.L.P., by William L. Esser, IV, for the Guardian ad Litem.

Hall & Hall Attorneys at Law, P.C., by Douglas L. Hall, for respondent-appellant.

JACKSON, Judge.

On 14 May 2004, the Caldwell County Department of Social Services ("DSS") filed juvenile petitions alleging that W.L.M. and B.J.M. were neglected and dependent as to both their mother ("respondent") and their father. Both parents stipulated that W.L.M. and B.J.M. were dependent juveniles, and in adjudication and disposition orders filed 11 August 2004, custody of the juveniles was placed with DSS. DSS had obtained nonsecure custody of the juveniles prior to the adjudication and disposition hearing. Multiple review hearings were held over the course of the next year, and in an order filed 29 March 2005, the permanent plan for the children was changed to adoption. On 17 May 2005, DSS filed a motion to terminate respond-

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ent's parental rights. After several continuances of the termination of parental rights hearing, the hearing was conducted on 2 November and 30 November 2005. In an order filed 22 November 2005, the trial court found that grounds existed to terminate respondent's parental rights, and in an order filed 5 December 2005, the trial court terminated respondent's parental rights after finding that it was in W.L.M. and B.J.M.'s best interest. Respondent appeals from the termination of her parental rights to W.L.M. and B.J.M.

[1] We begin by noting that respondent has failed to assign error to any of the trial court's findings of fact, and as such, all are deemed binding on appeal. "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *In re L.A.B.*, 178 N.C. App. 295, 298, 631 S.E.2d 61, 64 (2006) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

[2] Respondent first contends the trial court lacked subject matter jurisdiction over the termination of parental rights hearing because it did not comply with the time limits as set forth in North Carolina General Statutes, section 7B-1109. Section 7B-1109 provides in pertinent part:

The hearing on the termination of parental rights shall be conducted by the court sitting without a jury and shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 90 days from the filing of the petition or motion unless the judge pursuant to subsection (d) of this section orders that it be held at a later time.

N.C. Gen. Stat. § 7B-1109(a) (2005). Section 7B-1109(d) provides that:

The court may for good cause shown continue the hearing for up to 90 days from the date of the initial petition in order to receive additional evidence including any reports or assessments that the court has requested, to allow the parties to conduct expeditious discovery, or to receive any other information needed in the best interests of the juvenile. Continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice, and the court shall issue a written order stating the grounds for granting the continuance.

N.C. Gen. Stat. § 7B-1109(d) (2005). In the instant case, the motion to terminate respondent's parental rights was filed on 17 May 2005, and

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the initial hearing on the motion was held 2 November 2005, one hundred and sixty-nine days later. The order terminating respondent's parental rights subsequently was filed 5 December 2005, more than two hundred days after the filing of the initial motion to terminate respondent's parental rights. Respondent contends the delay in conducting the termination hearing constitutes prejudice *per se* and as such, she is entitled to a new hearing. We disagree.

This Court has held that in order to require the reversal of a trial court's order due to a violation of the time requirements of section 7B-1109(a), a respondent must demonstrate prejudice resulting from the delay. *In re S.W.*, 175 N.C. App. 719, 722, 625 S.E.2d 594, 596, *disc. review denied*, 360 N.C. 534, 635 S.E.2d 59 (2006). In respondent's case, the termination hearing initially was calendared for 13 July 2005, which would have been well within the required ninety day time frame. However, the hearing was continued until 24 August 2005 due to the unavailability of an essential witness. At a hearing held 24 August 2005, a second continuance was ordered due to the juveniles' father executing relinquishment of his parental rights. This continuance of the hearing until 7 September 2005 was consented to by all parties, including respondent. At a hearing held on 7 September 2005, respondent's termination hearing again was continued due to the primary social worker in the case having given birth two days earlier. On 5 October 2005, respondent's termination hearing was continued until 2 November 2005 due to the social worker's being on maternity leave. Each continuance granted by the trial court was necessary in order for all the essential parties to be present and to provide testimony and evidence at the termination hearing. At no time did respondent object to any delay or continuance. Respondent has failed to provide any argument as to how she, or the children, were specifically prejudiced by the delay. As such, respondent's assignment of error is overruled.

[3] Respondent next argues the trial court erred in taking judicial notice of the prior orders and various court reports in the juveniles' underlying case files. At trial, respondent did not object to the trial court's taking judicial notice of the underlying juvenile case files for W.L.M. and B.J.M. and, therefore, has waived appellate review of this issue. N.C. R. App. P. 10(b)(1). Respondent objected only to the trial court's taking judicial notice of the underlying case file for the juveniles' sister, J.M. In response to respondent's objection, the trial court did not take judicial notice of J.M.'s underlying file.

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In any event, this Court repeatedly has held that a trial court may take judicial notice of earlier proceedings in the same case. *See In re J.W., K.W.*, 173 N.C. App. 450, 455-56, 619 S.E.2d 534, 539-40 (2005), *aff'd*, 360 N.C. 361, 625 S.E.2d 780 (2006); *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005); *In re Isenhour*, 101 N.C. App. 550, 553, 400 S.E.2d 71, 73 (1991). Moreover, the trial court "is presumed to have disregarded any incompetent evidence." *In re S.N.H.*, 177 N.C. App. 82, 88, 627 S.E.2d 510, 515 (2006) (quoting *J.B.*, 172 N.C. App. at 16, 616 S.E.2d at 273).

The trial court's order of termination of parental rights states that the findings of fact are based upon clear, cogent and convincing evidence. Respondent has neither demonstrated how she was prejudiced by the trial court's consideration of the orders and reports from earlier proceedings in the case, nor has she pointed to any findings of fact or conclusions of law which were reached impermissibly due to a reliance on the underlying files. There is nothing in the record to indicate the trial court failed to conduct an independent determination of the facts and evidence warranting termination of respondent's parental rights. *See J.B.*, 172 N.C. App. at 16, 616 S.E.2d at 273 (citing *In re Ballard*, 311 N.C. 708, 715-16, 319 S.E.2d 227, 232-33 (1984)). As such, respondent's assignment of error is overruled.

[4] Respondent next contends the trial court lacked subject matter jurisdiction over the termination hearing based upon the motion to terminate respondent's parental rights being untimely filed pursuant to North Carolina General Statutes, section 7B-907. Section 7B-907 provides:

If a proceeding to terminate the parental rights of the juvenile's parents is necessary in order to perfect the permanent plan for the juvenile, the director of the department of social services shall file a petition to terminate parental rights within 60 calendar days from the date of the permanency planning hearing unless the court makes written findings why the petition cannot be filed within 60 days. If the court makes findings to the contrary, the court shall specify the time frame in which any needed petition to terminate parental rights shall be filed.

N.C. Gen. Stat. § 7B-907(e) (2005). We previously have held that "the time limitation specified in [section] 7B-907(e) is directory rather than mandatory and thus, not jurisdictional." *In re B.M., M.M., An.M., Al.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005); *see also In re C.L.C., K.T.R., A.M.R., E.A.R.*, 171 N.C. App. 438, 445, 615

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S.E.2d 704, 708 (2005), *aff'd and disc. review improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006). Absent a showing of prejudice as a result of the delay in filing the motion or petition seeking to terminate respondent's parental rights, the trial court will not be reversed. *See C.L.C.*, 171 N.C. App. at 445, 615 S.E.2d at 708; *In re As.L.G. & Au.R.G.*, 173 N.C. App. 551, 555-56, 619 S.E.2d 561, 564-65 (2005), *disc. review improvidently allowed*, 360 N.C. 476, 628 S.E.2d 760 (2006).

In the instant case, a review hearing was held 23 February 2005, at which time the permanent plan for the juveniles was changed to that of adoption. DSS subsequently filed the motion to terminate respondent's parental rights on 17 May 2005, eighty-three days after the date of the hearing and in violation of section 7B-907(e). All parties acknowledge that the motion to terminate respondent's parental rights was untimely filed in violation of section 7B-907(e); however, respondent has failed to present any argument as to how this delay prejudiced her or any other party to the matter. As respondent has failed to demonstrate how she was prejudiced, we hold the trial court was not divested of subject matter jurisdiction over this matter, and we will not reverse the trial court's order based upon DSS' failure to comply with this statutory time frame. Respondent's assignment of error is overruled.

[5] Finally, respondent contends the motion to terminate her parental rights was void *ab initio* and conferred no subject matter jurisdiction upon the trial court on the grounds that no order conferring custody of the children upon DSS was attached to the motion. North Carolina General Statutes, section 7B-1104(5) provides that the petition or motion seeking to terminate an individual's parental rights shall contain "[t]he name and address of any person or agency to whom custody of the juvenile has been given by a court of this or any other state; and a copy of the custody order shall be attached to the petition or motion." N.C. Gen. Stat. § 7B-1104(5) (2005).

As this Court has noted, "[s]ubject matter jurisdiction refers to the power of the court to deal with the kind of action in question . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal. *See In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006). "[B]efore a court may act there must be some appropriate application invoking the

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judicial power of the court with respect to the matter in question.’ ” *In re McKinney*, 158 N.C. App. 441, 444, 581 S.E.2d 793, 795 (2003) (quoting *In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991)). North Carolina General Statutes, section 7B-1103 identifies the parties with standing to petition the trial court for termination of parental rights, *see* N.C. Gen. Stat. § 7B-1103 (2005), and “to have standing to file for termination of parental rights, DSS must prove that it has legal custody of the child at the time the petition is filed.” *In re T.B.*, 177 N.C. App. 790, 792, 629 S.E.2d 895, 897 (2006).

In support of her argument, respondent relies upon *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), in which this Court held that failure to comply with this statutory mandate divests the trial court of subject matter jurisdiction. *Id.* at 570, 613 S.E.2d at 301. We find respondent’s reliance on *Z.T.B.* to be misplaced.

In *Z.T.B.*, we held that the petition to terminate the father’s parental rights was facially defective in that it failed to confer subject matter jurisdiction upon the trial court due to the failure to attach an existing custody order to the petition. *Id.* at 570, 613 S.E.2d at 301. The facts of *Z.T.B.* are wholly distinguishable from those in the instant case, and thus we hold that *Z.T.B.* is not controlling in the present situation. In *Z.T.B.*, the issue of where the child was physically located and who had legal custody was very much in question at the time the petition to terminate the father’s parental rights was filed. This was not the case with W.L.M. and B.J.M.

In *In re T.B.*, 177 N.C. App. 790, 629 S.E.2d 895 (2006), this Court recently held that “where DSS files a motion for termination of parental rights, the trial court has subject matter jurisdiction only if the record includes a copy of an order, in effect when the petition is filed, that awards DSS custody of the child.” *Id.* at 793, 629 S.E.2d at 897. The Court in *T.B.* went on to hold that the error of failing to attach a custody order may be remedied by making the custody order “a part of the record before the trial court.” *Id.* at 793, 629 S.E.2d at 898.

In the instant case, there is no indication that DSS attached a copy of any custody order to the motion to terminate respondent’s parental rights. However, there is also no indication that respondent was unaware of the placement or custody of W.L.M. and B.J.M. at any time during the pendency of this matter. Similarly, the motion stated that

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The Caldwell County Department of Social Services was given legal custody of the minor children, who presently reside in foster care in Caldwell County, North Carolina, pursuant to the issuance of a Non-Secure Custody Order on May 13, 2004. They have been in the custody of the Movant continuously since that date.

Thus, unlike in *T.B.*, the motion to terminate respondent's parental rights incorporated by reference the juvenile file and custody order in effect when the motion was filed. The numerous orders in the record note that respondent, her attorney, and her guardian ad litem were all present at each review hearing in which custody was granted to and continued with DSS. Moreover, the complete underlying case files for W.L.M. and B.J.M. were before the trial court, including the orders providing DSS with initial and continuing custody. The trial court specifically took judicial notice of the underlying case files, and as such, "the record include[d] a copy of an order, in effect when the [motion was] filed, that award[ed] DSS custody of the child[ren]."
T.B., 177 N.C. App. at 793, 629 S.E.2d at 897.

While ideally a custody order should be attached to all motions or petitions seeking to terminate a parent's rights, we hold that in the instant case respondent was not prejudiced by the lack of a custody order being attached to the motion. The record before the trial court contained a custody order awarding DSS custody of the children, and thereby DSS showed that it had standing to file for termination of respondent's parental rights. In addition, respondent has failed to demonstrate that she was prejudiced in any way by DSS' failure to physically attach a custody order to the motion seeking to terminate her parental rights. There was no question concerning where W.L.M. and B.J.M. were physically located or who had legal custody over them. Respondent's final assignment of error is also overruled.

Affirmed.

Judges CALABRIA and GEER concur.

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GERALD T. LANE, EMPLOYEE, PLAINTIFF v. AMERICAN NATIONAL CAN COMPANY, EMPLOYER, SELF-INSURED (GALLAGHER BASSETT SERVICES, INC., SERVICING AGENT), DEFENDANTS

No. COA06-87

(Filed 6 February 2007)

1. Workers' Compensation—occupational disease—failure to make necessary findings—greater risk of contracting psychological condition

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff did not suffer a compensable occupational disease due to his employment, and the case is remanded for entry of necessary findings, because: (1) work-related depression or other mental illness may qualify as a compensable occupational disease under appropriate circumstances; and (2) the Commission failed to make any finding of fact resolving the conflicting testimony as to whether plaintiff was placed at a greater risk for contracting his psychological condition than the general public.

2. Workers' Compensation—expert testimony—methodology—credibility

The Industrial Commission did not abuse its discretion in a workers' compensation case by admitting the opinion of a psychiatrist that was allegedly not based on scientific, technical, or otherwise specialized knowledge, because: (1) plaintiff's contentions on appeal only challenge the methodology of the expert's opinion which goes to the weight of her testimony and not the admissibility; and (2) North Carolina does not apply the gate-keeping function articulated by *Daubert*, 509 U.S. 579 (1993), but instead leaves the duty of weighing the credibility of the expert testimony to the trier of fact.

3. Workers' Compensation—failure to rule on discovery motions—implicit ruling

The Industrial Commission did not err in a workers' compensation case by allegedly failing to rule on certain discovery motions brought against plaintiff because, although the Commission's ruling was not as explicit as desired, an implicit ruling was made on the motions brought forward on appeal to the Commission.

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Appeal by plaintiff and defendants from an opinion and award filed 6 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2006.

Elliot Pishko Morgan, PA, by J. Griffin Morgan, for plaintiff appellant-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendant appellants-appellees.

McCULLOUGH, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission (“the Commission”) denying workers’ compensation benefits to Gerald Lane (“plaintiff”) based on the finding that plaintiff did not develop an occupational disease which was due to causes and conditions characteristic of and peculiar to her employment with defendant American National Can Company (“ANC”) and which excluded all ordinary diseases of life to which the general public was equally exposed. Defendants appeal from the opinion and award of the Commission on the grounds that the Commission failed to address certain motions brought forward by defendants and asks that this Court remand for a further determination of those issues. For the reasons that follow, we remand for the Commission to make additional findings of fact.

On 1 June 2000, plaintiff filed a notice of accident to his employer, defendant ANC, alerting the company that he contracted an occupational disease, “major depression, emotional and mental disability” due to “severe and extreme work related stress and pressure” on 18 March 1999. ANC denied plaintiff’s claim and the case came for hearing before the Commission on 14 October 2003.

The relevant facts found by the Commission are as follows: Plaintiff began working for the company, now known as ANC, in 1975. He began as an operator of a can production machine, was promoted to line supervisor and eventually to Assistant Production Manager. Plaintiff maintained his position as Assistant Production Manager until the early 90’s when ANC purchased the company and began to downsize. At the time of downsize, plaintiff was offered and accepted his former position as a line supervisor which he remained in until 18 March 1999.

Plaintiff testified that ANC continued to downsize causing him to work harder, be more productive with less help and incur changes in

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the manner in which he performed his job resulting in increased levels of stress and increased job duties. Plaintiff sought psychiatric help in March 1999 from Dr. McCauley in which plaintiff noted: "I am stressed from my job, from the physical and mental demands from the new owners, which have been getting worse for the past eight to ten months. As a result, I hate my peers and I feel like bashing them with arguments and I cannot forget what's been happening for more than a year."

Dr. Artigues, an expert witness board certified in general and forensic psychiatry, testified that she could not render an opinion that plaintiff was suffering from depression based on the symptoms he exhibited during her evaluation. She further testified that the job stressors and duties identified by plaintiff were not characteristic of and peculiar to his employment with ANC. She based her opinions on her experience as a clinical psychiatrist who treats patients with job-related stress issues. Dr. Artigues further opined that plaintiff was not at a greater risk of developing psychiatric issues when compared to the general public as plaintiff's situation could happen in any occupation.

Other experts, Dr. Noble, Dr. Elliott and Dr. McCauley, testified on behalf of plaintiff opining that he was depressed and that his working conditions were a causal factor in plaintiff's developing such depression. Dr. Noble further stated that plaintiff's job placed him at a greater risk of suffering from depression than members of the general public based on the model theory of high demand and low discretion.

The Commission then found:

There is no competent evidence in the record to establish that plaintiff's working conditions at ANC exposed him to unique or peculiar job stressors to which the general public is not exposed. The greater weight of the evidence is that the job stressors plaintiff experienced at ANC can occur in any profession or industry. The working conditions which brought on plaintiff's increased level of stress are not characteristic of and peculiar to his line management supervisor position with ANC because these working conditions can occur in any industry, trade or profession.

The Commission concluded that plaintiff's psychological conditions were not due to causes and conditions characteristic of and peculiar to plaintiff's employment, that it was an ordinary disease of life and

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therefore not an occupational disease. The Commission then concluded that plaintiff's benefits should be denied. Mr. Lane appeals and ANC cross-appeals.

[1] Plaintiff contends on appeal that the Commission erred in concluding that plaintiff did not suffer a compensable occupational disease due to his employment.

The standard of review for an opinion and award of the North Carolina Industrial Commission is "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusions of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). In determining the facts of a particular case, "[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony." *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002). "This Court reviews the Commission's conclusions of law *de novo*." *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

It is well established that work-related depression or other mental illness may qualify as a compensable occupational disease under appropriate circumstances. *See, e.g., Smith-Price v. Charter Pines Behavioral Ctr.*, 160 N.C. App. 161, 171, 584 S.E.2d 881, 888 (2003) (affirming award of benefits to a registered nurse who suffered from post-traumatic stress disorder); *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 117, 476 S.E.2d 410, 413 (1996) (stating that case law "recognized depression, a mental condition, as an occupational disease and compensable under the [Workers' Compensation] Act"); *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997); *Pulley v. City of Durham*, 121 N.C. App. 688, 694, 468 S.E.2d 506, 510 (1996) (affirming an award of benefits to a police officer who developed post-traumatic stress disorder and depression). The claimant must first establish, however, that "the mental illness or injury was due to stresses or conditions different from those borne by the general public." *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002).

In order to prove that an employee has an occupational disease, the employee has the burden of proving three elements:

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“(1) the disease is characteristic of and peculiar to persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) ‘the disease is not an ordinary disease of life to which the public is equally exposed;’ and (3) there is a causal connection between the disease and the plaintiff’s employment.”

Id. at 648, 566 S.E.2d at 812-13 (citations omitted). Our Supreme Court explained in *Rutledge*:

To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. . . . Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded.

Rutledge v. Tultex Corp., 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983).

Our Supreme Court has stated that these elements are met “if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally.” *Id.* at 93-94, 301 S.E.2d at 365. In the instant case there were several findings of fact reciting conflicting expert testimony as to whether plaintiff’s workplace stressors and employment places him at a greater risk for contracting depression than the public in general. Additionally, the Commission concluded that plaintiff’s “psychological condition is an ordinary disease of life to which the general public, not so employed, is equally exposed.” However, the Commission failed to make any finding of fact resolving the conflicting testimony as to whether plaintiff was placed at a greater risk for contracting his psychological condition than the general public.

This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence and the Commission must resolve the conflicting testimony. *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109 (1981); *In re Rogers*, 297 N.C. 48, 56, 253 S.E.2d 912, 917-18 (1979); and *Thomason v. Cab Co.*, 235 N.C. 602, 605-06, 70 S.E.2d 706, 708-09 (1952); The findings of fact contained in the opinion and award of the Commission fail to include a definitive determination as to whether plaintiff was placed at a greater risk for contracting the psychological condition than the general public equally exposed, and therefore the case must be remanded for entry of such necessary findings.

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[2] Plaintiff further contends that the Commission erred in admitting the opinion of Dr. Artigues where it was not based on scientific, technical, or otherwise specialized knowledge. We disagree.

It appears that our courts have never decided whether the standard for admissibility of expert testimony set forth in *Goode* and *Howerton* applies in the workers' compensation context. However, even assuming *arguendo*, without deciding that the *Goode* and *Howerton* standard applies, Dr. Artigues' testimony was sufficiently reliable.

It is well established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C. Gen. Stat. § 8C-1, Rule 104(a) (2005). Trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Where such latitude has been vested within the trial court, it follows that a ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004). A trial court abuses its discretion only when its ruling is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

The admissibility of expert testimony is also governed by Rule 702 of the North Carolina Rules of Evidence, which states:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2005). The Supreme Court of North Carolina in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), set out a three-part analysis for determining whether to permit expert testimony. The first step evaluates whether the expert's method of proof is sufficiently reliable as an area for expert testimony. *Id.* at 527, 461 S.E.2d at 639. The second step determines whether the witness testifying at trial is qualified as an expert in that area of testimony. *Id.* at 529, 461 S.E.2d at 640. Finally, the court

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must ask whether the expert's testimony is relevant. *Id.* at 529, 461 S.E.2d at 641.

Dr. Artigues was tendered as an expert in the fields of clinical and forensic psychiatry. She stated, in her opinion, that plaintiff did not exhibit any conditions that met the criteria for a psychiatric diagnosis. She further opined that the job stressors identified by plaintiff were not unique or peculiar to his employment at ANC but rather could occur in any workplace. Dr. Artigues proffered testimony showing that in forming her opinions she relied on articles and publications routinely relied on in the medical practice and her treatment of approximately 100 patients with work-related stress issues.

A review of the records and briefs clearly shows that plaintiff's contentions on appeal only challenge the methodology of Dr. Artigues' opinion which goes to the weight of her testimony and not the admissibility, and this Court will not address such issues. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688 (holding that once an expert has passed Rule 702's threshold of admissibility, "lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility"). Our Supreme Court clearly stated in *Howerton* that North Carolina does not apply the gatekeeping function articulated by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), but rather leaves the duty of weighing the credibility of the expert testimony to the trier of fact. *See id.* This assignment of error is overruled.

[3] Defendant contends by way of cross-appeal that the Commission erred in failing to rule on certain discovery motions brought against plaintiff. We disagree.

"'[W]hen [a] matter is "appealed" to the full Commission . . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties.' " *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 474, 577 S.E.2d 345, 353 (2003) (citation omitted).

The Commission noted in its opinion and award that, "[t]he appealing parties have not shown good ground to reconsider the evidence, receive further evidence, rehear the parties or their representatives, or amend the Opinion and Award." While this ruling by the Commission is not as explicit as desired, it appears that an implicit ruling has been made on the motions brought forward on appeal to

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the Commission, and therefore it is unnecessary to remand the case back to the Commission for further rulings. This assignment of error is overruled.

Accordingly, the opinion and award of the Commission is remanded for additional findings.

Remanded.

Judges McGEE and GEER concur.



FRANK M. GOLDSTEIN, PLAINTIFF v. AMERICAN STEEL SPAN, INC., AND STEVEN S. SHEPHERD INDIVIDUALLY AND D/B/A SHEPHERD STEEL BUILDING SERVICE, DEFENDANTS

No. COA06-80

(Filed 6 February 2007)

Arbitration and Mediation— arbitration agreement—terms sufficiently clear—forum selection clause

The terms of an arbitration agreement were sufficiently definite to be enforceable under the normal rules of contract law, using the “gap-fillers” provided in the statutory framework of the Uniform Arbitration Act and the Federal Arbitration Act. The forum designated by the contract, North Dakota, is appropriate because the FAA preempts North Carolina’s public policy against arbitration in another state.

Judge McGEE dissenting.

Appeal by defendant from orders and judgment entered 11 August 2005 by Judge Orlando F. Hudson, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 23 August 2006.

Peake and McRae, P.A., by Thomas R. Peake, II, for the plaintiff-appellee.

Hemric, Lambeth, Champion & Moseley, P.A., by W. Phillip Moseley, for defendant-appellant.

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[181 N.C. App. 534 (2007)]

ELMORE, Judge.

On 19 June 2004, Frank M. Goldstein (plaintiff) brought an action against American Steel Span, Inc., a North Dakota corporation¹ (defendant) alleging two counts of breach of contract, negligent design and manufacture, negligent construction, conversion, unjust enrichment, and unfair deceptive trade practices. Defendant filed a motion on 15 April 2005 to stay the proceedings pending arbitration, which the trial court denied in an order filed 11 August 2005. In a second order entered 11 August 2005, the trial court also denied defendant's 15 April 2005 motion to stay plaintiff's motion for summary judgment in order to allow response to plaintiff's first request for admissions, and granted plaintiff's 4 March 2005 motion for summary judgment. Finally, in the second 11 August 2005 order, the trial court entered judgment against defendant in the amount of \$32,120.00 plus interest and costs. Defendant appeals from each of these orders and the subsequent judgment. Because we find that the trial court erred in its denial of defendant's motion to stay the proceedings pending arbitration, we reverse and remand with instructions.

On or about 16 June 2003, the parties formed a contract under which plaintiff would purchase two buildings from defendant for the price of \$33,840.00. The buildings were to be shipped unassembled to plaintiff, where they would be assembled by an independent contractor. Plaintiff claims to have modified the original contract in July, 2003 by cancelling his order for the second building. Though plaintiff states in his brief that defendant "did not object to the cancellation . . ." defendant denies that the order was cancelled.

The contract to which the parties agreed included a page headed "TERMS AND CONDITIONS," clause ten of which is titled "ARBITRATION." Clause ten states, "All claims, disputes, and other matters in question arising out of or relating to this Agreement of Sale, or breach hereof, shall be submitted to binding arbitration in the City of Fargo, North Dakota." There appear to be fourteen clauses on the page, and defendant signed the page at the top. The entire contract consists of only two pages.

In an order filed 11 August 2005, the trial court denied defendant's 15 April 2005 motion to stay the proceedings pending arbitration. Defendant now assigns error to that denial, contending that the

1. Plaintiff also sued Steven S. Shepherd, individually and d/b/a Shepherd Steel Building Service, who was not served and did not participate further in the proceedings.

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arbitration clause was enforceable under the Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA). We agree. Accordingly, we reverse and remand to the trial court.

The dispositive issue before this Court is whether the arbitration clause in the parties' contract is enforceable. Because the trial court's decision regarding this issue is a judicially determined conclusion of law, our standard on review is *de novo*. *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 477-78, 583 S.E.2d 325, 330 (2003). "As a general matter, public policy favors arbitration. . . . [W]hether a dispute is subject to arbitration is a matter of contract law. Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate." *Id.* (citations omitted). At first blush, it appears that the parties' agreement to arbitrate fails to clearly specify its scope and terms. Indeed, the trial court found and concluded that "the terms of the arbitration clause are too indefinite and left open for future determination to show a meeting of the minds with regard to the purported agreement to arbitrate." As the North Carolina Business Court recently observed, however, "While the arbitration clause does not provide any details on the arbitrator or procedures for arbitration, these omissions are insufficient to strike the arbitration clause." *Polo Ralph Lauren Corp. v. Gulf Ins. Co.*, 2001 NCBC 3, 12, 00 CVS 5440 (2001).² As the Business Court noted in *Polo*, questions of arbitration are governed by the UAA, which has been adopted by both the North Carolina and North Dakota legislatures. *Id.*; N.C. Gen. Stat. § 1-567.1 *et seq.* (2000) (repealed); N.D. Cent. Code § 32-29.2-01 to 32-29.2-20 (2000). Because the contract at issue in the present case was executed in June 2003, the former incarnation of the UAA applies. N.C. Gen. Stat. § 1-567.1 *et seq.* (2000) (repealed). Under that version of the UAA, the failure of the parties to designate a process for determining who will arbitrate a dispute is not fatal to the agreement; on the contrary, the UAA contemplates just such an event: "If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof . . . the court on application of a party shall appoint one or more arbitrators." N.C. Gen. Stat. § 1-567.4 (2000) (repealed). The FAA contains a similar provision. See 9 U.S.C.S. § 5 (2006) (stating that "if no method be provided [in the agreement] . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the

2. The Court notes that the Business Court represents merely persuasive authority. However, we are mindful that the Business Court exists solely to hear complex business cases, and as such are respectful of its opinions.

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case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein”). Through the use of these “gap-fillers,” the otherwise fatally vague clause is saved: upon application of either party, an arbitrator may be appointed and that arbitrator would then have final say over the remainder of the process. We decline to offer any opinion on the issue of whether the parties should apply to a North Carolina or North Dakota court for such an appointment.

Plaintiff also argues, and the trial court found and concluded, “that the designation of Fargo, North Dakota as the forum for arbitration is unreasonable under the circumstances and that enforcement of the forum designation would contravene a strong public policy of North Carolina, and would impose grave inconvenience and unfairness upon Plaintiff.” It is uncontested that the FAA applies to this case. Because the FAA preempts North Carolina law through the Supremacy Clause of the United States Constitution, thus rendering the forum designation enforceable, we hold that Fargo, North Dakota, as agreed upon in the parties’ contract, is the appropriate locale for arbitration.

Plaintiff concedes that the FAA applies to this case, arguing primarily that the contract itself is unenforceable. However, plaintiff also argues that the forum selection clause contravenes North Carolina law and public policy. Plaintiff cites our General Statutes for the proposition that “any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.” N.C. Gen. Stat. § 22B-3 (2003). As plaintiff acknowledges, however, “the North Carolina statute cannot supercede the Federal Arbitration Act which provides that forum selection clauses are presumed valid.” See U.S. Const. Art. VI.

Plaintiff cites to several federal cases for the proposition that “a trial court has authority to strike an ‘unreasonable’ forum selection clause in an otherwise valid arbitration agreement.” *See, e.g., The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972); *Allen v. Lloyd’s of London*, 94 F.3d 923 (4th Cir. 1996). However, these cases “addressed a contractual provision which chose a forum for litigation, not for arbitration.” *Spring Hope Rockwool, Inc. v. Industrial Clean Air, Inc.*, 504 F. Supp. 1385, 1389 (E.D.N.C. 1981) (specifically discussing the United States Supreme Court’s decision in

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The Bremen). The *Spring Hope* court noted that forum selection clauses in arbitration and litigation are similar, but stated that in the case of arbitration, the courts are bound exclusively by the FAA. *Id.* “Under Section 2 [of the FAA], the arbitration provision must be enforced unless the party seeking to avoid arbitration can prove that the arbitration clause itself was voidable for fraud, coercion, or ‘such grounds as exist at law or in equity for the revocation of any contract.’” *Id.* (quoting 9 U.S.C.S. § 2 (2006)). Having already held that the arbitration clause is enforceable, it follows that the forum selection aspect of the clause is also enforceable.

The arbitration clause is governed by the UAA and FAA. Using the “gap-fillers” provided in that statutory framework, the arbitration clause is sufficiently definite to be enforceable under the normal rules of contract law. Furthermore, the FAA preempts North Carolina’s statute and public policy regarding forum selection; as such, the forum designated by the contract, North Dakota, is the appropriate forum. Accordingly, we reverse the trial court and remand with instructions to stay the proceedings pending arbitration of the dispute.

Reversed and remanded.

Judge BRYANT concurs.

Judge McGEE dissents by separate opinion.

McGEE, Judge, dissenting.

I respectfully dissent from the majority opinion. In light of violations of the Rules of Appellate Procedure in this case, I feel compelled to vote to dismiss this appeal.

Rule 10(c)(1) of the Rules of Appellate Procedure requires, in part,

[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

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N.C.R. App. P. 10(c)(1). Further, subsection (a) provides that “the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10.” N.C.R. App. P. 10(a).

Defendant’s second assignment of error reads as follows: “[t]he court’s denial of [D]efendant’s motion to stay the proceeding and compel arbitration pursuant to the contract on the ground that said arbitration clause was a part of the contract and reasonable under all circumstance.” In its brief, Defendant attempts to bring before this Court the following arguments: (1) “Congress has pre-empted matters ‘involving commerce’ where there is a written contract to arbitrate”; and (2) “State common law on ‘forum non conveniens’ and N.C.G.S. 22B-3 do not apply to written arbitration agreements involving interstate commerce[.]” Defendant’s assignments of error are insufficient to bring these arguments of Defendant properly before this Court. This Court has long held that “[t]he scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant’s brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.” *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994). “[B]road, vague, and unspecific” assignments of error do not comply with the Rules of Appellate Procedure. *In re Appeal of Lane Co.*, 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002). Nowhere in its assignments of error does Defendant reference preemption or the Federal Arbitration Act. By reaching the merits of this appeal, I believe the majority opinion has created an appeal for Defendant by determining issues not properly before us in contravention of our Supreme Court’s mandate in *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005) (“It is not the role of the appellate courts, however, to create an appeal for an appellant.”).

In addition to the above violations of Rule 10, Defendant also failed to include a statement of the grounds for appellate review in violation of N.C.R. App. P. 28(b)(4) and failed to include “a concise statement of the applicable standard(s) of review for each question presented” in violation of N.C.R. App. P. 28(b)(6).

For the reasons stated above, I respectfully dissent.

STATE v. WILSON

[181 N.C. App. 540 (2007)]

STATE OF NORTH CAROLINA v. BELINDA LORRAINE WILSON

No. COA06-452

(Filed 6 February 2007)

1. Child Abuse and Neglect— intentional child abuse—evidence sufficient

The State's evidence was sufficient for the jury to find that defendant intentionally inflicted injuries upon her child so as to support defendant's conviction of felonious child abuse inflicting serious injury where it tended to show that the child received burns from scalding and cigarettes, suffered from a subdural hematoma, and showed signs of undernourishment; the injuries were not accidental; and defendant had exclusive custody of the child at the time the injuries were sustained.

2. Sentencing— aggravating factors submitted to jury prior to *Blakely* Act—no error

The trial court did not err by submitting aggravating factors to the jury between the United States Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (which held that any fact that increases the penalty for a crime must be found by a jury) and the passage of North Carolina's *Blakely* Act. N.C.G.S. § 15A-1340.16(a1).

Appeal by defendant from judgment entered 5 December 2005 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 12 December 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sonya M. Calloway-Durham, for the State.

Terry W. Alford for defendant-appellant.

HUNTER, Judge.

Belinda Lorraine Wilson (“defendant”) appeals from her conviction entered upon a jury verdict finding her guilty of felonious child abuse inflicting serious bodily injury. Defendant argues there was insufficient evidence to support her conviction, and that the trial court erred in submitting aggravating factors to the jury. For the reasons stated herein, we find no error by the trial court.

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The State presented evidence tending to show that in the early morning hours of 15 May 2004, defendant brought her twenty-three month-old child (“the child”) to the emergency room of Cape Fear Medical Center in New Hanover County. The child had sustained extensive burns to her back and buttocks. After stabilization, the child was transported by helicopter to the North Carolina Jaycee Burn Center (“Burn Center”) at UNC Hospital in Chapel Hill for further treatment. Defendant gave numerous and differing accounts for the burns to the attending physicians and nurses, who did not believe defendant’s explanations were consistent with the child’s injuries. Dr. Desmond Runyon (“Dr. Runyon”), an expert in child abuse, opined at trial that the burns were the result of someone deliberately placing the child in scalding water twice.

While administering treatment for the child’s burns, physicians also discovered cigarette burn marks on the child’s chin and symmetrical burn marks on both of the child’s nipples. The treating physicians and medical experts found defendant’s explanations for these marks unpersuasive and stated the burn marks were the result of intentional action.

In addition to the burn marks, the child also exhibited chronic signs of neglect. The child’s appearance was “puny,” with gray skin and dull, broken hair. Physicians determined the child was developmentally delayed and undernourished. Blood tests indicated poor nutrition. The child weighed less when first admitted to the Burn Center than when the child left foster care approximately nine months earlier. The child was under defendant’s care during these nine months. During the near one-month stay at the Burn Center, the child gained 4.6 pounds and began to exhibit signs of a healthy baby.

Further tests revealed a blood clot, or subdural hematoma, on the right side of the child’s brain that was ten to fourteen days old. Dr. Runyon testified that a blood clot is life-threatening in small children, although the child’s blood clot was likely non-deadly. However, he stated that the blood clot could cause life-long medical complications. Dr. Runyon believed shaking to be the most probable explanation for the blood clot. Defendant posited no alternative explanation. Ultimately, Dr. Runyon diagnosed the child with a subdural hematoma, first and second degree burns, battered child syndrome, and failure to thrive.

Defendant testified on her own behalf at trial. Defendant admitted she lied to various physicians, nurses, social workers, friends, and

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family as to the cause of her child's injuries. Defendant testified she was giving the child a bath in the sink, but left the child unattended in order to meet her cocaine dealer outside. Defendant stated she accidentally left the hot water running, resulting in the child's burns. Defendant admitted she was using cocaine at the time of the incident. Defendant initially testified that the nipple burns were caused by hot buttons and zippers on a shirt taken out of a clothes dryer and put on the child. However, defendant later testified on cross-examination that she assumed the burns came from a curling iron. She stated the child sustained the cigarette burn to the chin when the child accidentally fell upon a lit cigarette.

Upon presentation of the evidence, the jury found defendant guilty of felonious child abuse inflicting serious bodily injury. Following the verdict, the trial court instructed the jury regarding two aggravating factors the State contended existed in the case, and both sides were given the opportunity to argue regarding the aggravating factors. Specifically, the State argued the offense was especially heinous, atrocious, or cruel, and that the victim was very young. Among its other instructions, the trial court charged the jury that it had to find the aggravating factors beyond a reasonable doubt. Following deliberations, the jury found in favor of the aggravating factors. The trial court found no mitigating factors. Finding that the factors in aggravation outweighed the factors in mitigation, and that an aggravated sentence was justified, the trial court sentenced defendant in the aggravated range to 125 to 159 months of imprisonment. Defendant appeals.

[1] Defendant first argues the State did not submit sufficient evidence for the jury to find that defendant intentionally abused her child, and that the trial court therefore erred in denying her motion to dismiss. We do not agree.

The standard of review upon a defendant's motion to dismiss is well established. "In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E.2d at 169. The evidence must be viewed in the light most favorable to the State. *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993). Contradiction and discrepancies in the evidence are to be resolved by the jury. *Id.*

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In order to prove felonious child abuse inflicting serious bodily injury, the State must prove the following: (1) the defendant was the parent of the child; (2) the child had not reached her sixteenth birthday; and (3) the defendant intentionally and without justification or excuse inflicted serious bodily injury. N.C. Gen. Stat. § 14-318.4(a3) (2005). In the instant case, only the third element is disputed.

"[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120-21 (2003). Defendant had exclusive custody of the child at the time the injuries were sustained. The treating physicians and medical experts agreed that the injuries were not accidental, but rather intentionally inflicted. Defendant presented no rebuttal experts. In fact, the only evidence to the contrary was defendant's testimony in her defense. Defendant changed her account of the cause of the injuries numerous times and even contradicted herself on the witness stand. Thus, there was substantial evidence from which a reasonable jury could believe the physicians' and medical experts' testimony over defendant's explanation. As substantial evidence was introduced to support the jury's verdict of guilt, the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant next argues the trial court erred in submitting the issue of aggravating factors to the jury. On 24 June 2004, prior to defendant's conviction and sentencing, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. *Blakely v. Washington*, 542 U.S. 296, 303, 159 L. Ed. 2d 403, 413 (2004). "Thus, after *Blakely*, trial judges may not enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt." *State v. Blackwell*, 361 N.C. 41, 45, 638 S.E.2d 452, 455 (2006). Responding to *Blakely*, the North Carolina General Assembly on 30 June 2005 passed the *Blakely Act*, which amended North Carolina structured sentencing law to provide that "only a jury may determine if an aggravating factor is present in an offense." N.C. Gen. Stat. § 15A-1340.16(a1) (2005). Defendant acknowledges that the trial court complied with the mandates of *Blakely*, but argues that since the offense occurred before the *Blakely* Act was passed, the trial

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judge had no authority to submit the issue of aggravating factors to the jury. We find no merit to this argument.

Our Supreme Court recently rejected a similar argument in *Blackwell*. There, the defendant argued that the trial court's error in finding a factor in aggravation was not harmless beyond a reasonable doubt "because the trial court allegedly lacked a procedural mechanism by which to submit the challenged aggravating factor to the jury." *Blackwell*, 361 N.C. at 45, 638 S.E.2d at 456. The *Blackwell* Court noted initially that the defendant failed to "demonstrate why the absence of a statutory mechanism to submit aggravating factors to the jury complicates our task in applying federal harmless error analysis[.]" *Id.* "In other words, as a practical matter, it is the same *Blakely* error to which a defendant is subjected, regardless of whether a statutory procedure exists. There is no meaningful difference between having a procedural mechanism and not using it, and not having a procedural mechanism at all." *Id.* at 46, 638 S.E.2d at 456.

The Court moreover rejected the defendant's assertion that no procedural mechanism existed in North Carolina prior to the *Blakely* Act to submit aggravating factors to the jury, stating that "North Carolina law independently permits the submission of aggravating factors to a jury using a special verdict." *Id.* The Court defined a special verdict as "a common law procedural device by which the jury may answer specific questions posed by the trial judge that are separate and distinct from the general verdict." *Id.* at 47, 638 S.E.2d at 456. Special verdicts are subject to but two limitations: (1) they must employ a "beyond a reasonable doubt" standard, and (2) they must require the jury to apply law to the facts; that is, the jury must do more than "only make[] findings on the factual components of the essential elements alone[.]" *Id.* at 47, 638 S.E.2d at 457. The Court reflected that "[i]t is difficult to imagine a more appropriate set of circumstances for the use of a special verdict than those existing in the instant case, in which a special verdict in compliance with the above limitations would have safeguarded [the] defendant's right to a jury trial under *Blakely*[.]" *id.* at 48, 638 S.E.2d at 457, and concluded that "[a]ccordingly, prior to the *Blakely* Act, special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury." *Id.* at 49, 638 S.E.2d at 458.

In the instant case, the trial court followed the clear edict from the United States Supreme Court in *Blakely* and properly submitted the alleged aggravating factors to the jury through the use of a special

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verdict. The trial court clearly instructed the jury that it must find the aggravating factors beyond a reasonable doubt, and further required the jury to apply the applicable law to the facts it found. The trial court's action also complied with the *Blakely* Act, even if the law was technically inapplicable at the time, and thus the trial court complied with the public policy of the State. "Significantly, defendant fails to submit any compelling reason why the use of a special verdict to submit aggravating factors to the jury at [her] trial would have resulted in prejudice, and our research reveals none." *Id.* at 49, 638 S.E.2d at 458. We overrule this assignment of error.

As substantial evidence supported the jury's finding of guilt and the trial court did not err by submitting the decision of aggravating factors to the jury, no error occurred in the rendering of the guilty verdict and the sentencing of defendant.

No error.

Judges WYNN and STEELMAN concur.

CHARLIE T. THOMAS, EMPLOYEE, PLAINTIFF-APPELLANT v. McLAURIN PARKING COMPANY, EMPLOYER; HARLEYSVILLE INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEES

No. COA06-375

(Filed 6 February 2007)

1. Workers' Compensation— motion for leave to submit additional evidence—implicit ruling

The Industrial Commission did not err in a workers' compensation case by failing to rule on plaintiff's motion for leave to submit additional evidence because, although the Commission's ruling was not as explicit as desired, an implicit ruling was made on the motions brought forward on appeal to the Commission.

2. Workers' Compensation— findings of fact—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation case by its findings of fact 7, 8, and 9, because: (1) plaintiff confused the distinction made by the Commission between the evidence regarding the employment causing the aggravation of

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the arthritis and the employment causing the arthritic condition; and (2) neither doctor testified that plaintiff's employment caused his arthritis nor that his employment placed him at a greater risk for contracting arthritis.

3. Workers' Compensation— failure to make additional findings—causation—occupational disease

The Industrial Commission did not err in a workers' compensation case by failing to make additional findings as to causation and failing to make findings as to each element of an occupational disease, because: (1) the Commission is not required to find facts as to all credible evidence, but only those facts which are necessary to support its conclusions of law; and (2) the Commission is not required to make findings of fact as to each element of an occupational disease claim upon denial, and the denial may be predicated upon the failure of the claimant to prove any one of the elements of compensability.

4. Workers' Compensation— occupational disease—causation—employment placed at greater risk

The Industrial Commission did not err in a workers' compensation case by applying the standards set forth in *Futrell v. Resinall Corp.*, 151 N.C. App. 456 (2002), regarding compensation for an occupational disease claim, because: (1) evidence of the aggravation of a preexisting idiopathic condition caused by a claimant's employment is sufficient to establish a causal connection for an occupational disease claim; (2) although plaintiff contends that requiring a claimant to further show that his employment placed him at a greater risk for contracting the condition would abrogate occupational disease claims, this issue is better addressed by the legislature; and (3) no evidence was presented by either doctor presenting testimony to the Commission that plaintiff's employment placed him at a greater risk for contracting degenerative arthritis.

Appeal by plaintiff from opinion and award entered 5 October 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 December 2006.

Law Offices of George W. Lennon, by George W. Lennon, for plaintiff appellant.

Lewis & Roberts, PLLC, by Scott J. Lasso and Paul C. McCoy, for defendant appellees.

THOMAS v. McLaurin Parking Co.

[181 N.C. App. 545 (2007)]

McCULLOUGH, Judge.

Charlie Thomas (“plaintiff”) appeals from an opinion and award entered by the North Carolina Industrial Commission (“the Commission”) denying plaintiff’s claims for worker’s compensation benefits based on the finding and conclusion that plaintiff failed to establish an occupational disease claim where he failed to show that his employment placed him at a greater risk for contracting or developing his debilitating condition.

Plaintiff filed a notice of accident as required under the Worker’s Compensation Act stating that he was injured or contracted an occupational disease, namely inflammation of the left hip and leg, on 7 April 2000 due to the conditions of his employment. The claim for compensation was denied by the employer and subsequently set for hearing by a Deputy Commissioner. Deputy Commissioner, Phillip A. Baddour, III, denied plaintiff’s claims and plaintiff appealed such decision to the Commission. Plaintiff further motioned the Commission for leave to redepose Dr. Cook and submit additional evidence on appeal.

The relevant facts found by the Commission are as follows: Plaintiff was employed by McLaurin Parking Company (“defendant”) starting in July 1999 and was assigned to work a controlled access parking gate at Wake Medical Center. Plaintiff worked from a gate-house which was located approximately 10 to 15 feet from the gate requiring plaintiff to leave the gatehouse in order to check persons in and out of the parking lot. Plaintiff was provided with a small metal stool to sit on while inside the booth.

After beginning work with defendant, plaintiff began to experience pain in his left hip area which he attributed to sitting on the hard metal stool. Due to the pain, plaintiff did not return to work after 7 April 2000. Plaintiff was diagnosed with degenerative arthritis of the left hip by Dr. Frederick Benedict, an orthopaedic surgeon.

The Commission further found that “plaintiff was more likely at an increased risk of developing an aggravation of his arthritic condition than members of the general public” and that plaintiff’s job conditions were “not an activity to which the general public was equally exposed”; but that there was no evidence that “plaintiff’s job placed him at an increased risk of contracting or developing degenerative arthritis of the left hip than the general public not so employed.”

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The Commission concluded that plaintiff failed to establish an occupational disease where he had not shown that his employment exposed him to a greater risk of contracting the disease of degenerative arthritis than the general public not so employed. Plaintiff appeals.

[1] Plaintiff first contends on appeal that the Commission erred in failing to rule on plaintiff's motion for leave to submit additional evidence. We disagree.

Plaintiff correctly notes that the Commission is required to decide all matters in controversy between the parties. *Vieregge v. N.C. State University*, 105 N.C. App. 633, 638, 414 S.E.2d 771, 774 (1992).

The Commission noted in its opinion and award that “[t]he appealing party has not shown good grounds to reconsider the evidence, receive further evidence or rehear the parties or their representatives.” While this ruling by the Commission is not as explicit as desired, it appears that an implicit ruling has been made on the motions brought forward on appeal to the Commission, and therefore it is unnecessary to remand the case to the Commission for further rulings. This assignment of error is overruled.

[2] Next, plaintiff contends that the Commission erred where the findings of fact are not supported by competent evidence and are incomplete. We disagree.

Plaintiff contends that the Commission erred in making findings of fact 7, 8 and 9 where they are not supported by the evidence. The standard of review for an opinion and award of the North Carolina Industrial Commission is “(1) whether any competent evidence in the record supports the Commission’s findings of fact, and (2) whether such findings of fact support the Commission’s conclusions of law.” *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997). “The Commission’s findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding.” *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002). In determining the facts of a particular case, “[t]he Commission is the sole judge of the credibility of the witnesses and the weight accorded to their testimony.” *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109-10, 561 S.E.2d 287, 291 (2002).

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Findings of fact 7, 8 and 9 are as follows:

7. At his deposition, Dr. Benedict stated that there were not many treatment options he could offer plaintiff. Dr. Benedict felt plaintiff's pain was not severe enough to perform cortisone injections or surgery. Dr. Benedict doubted that the type of design of stool on which plaintiff sat was a substantial contributing factor in the aggravation or acceleration of plaintiff's symptoms. Dr. Benedict stated, "just sitting in a normal chair getting up a hundred times a day probably was as much a factor as anything." Dr. Benedict's opinion was that plaintiff was more likely at an increased risk of developing an aggravation of his arthritic condition than members of the general public. He also stated that getting up and down a couple hundred times per day was not an activity to which the general public was equally exposed. Additionally, Dr. Cook testified that plaintiff was at an increased risk of injury to his left hip because of his pre-existing arthritis in that hip, but he did not testify that plaintiff was at an increased risk of injury to his left hip because of his employment.

8. Based upon the competent medical evidence of record, plaintiff's degenerative arthritis of the left hip pre[-]existed his job with defendant-employer. This pre-existing condition was aggravated by plaintiff's job duties, which required repetitive sitting and walking. However, plaintiff did not present evidence that his arthritis was characteristic of or peculiar to his employment.

9. While the medical evidence shows that plaintiff's job placed him at an increased risk of aggravating his pre-existing arthritis, neither Dr. Cook nor Dr. Benedict offered an opinion that plaintiff's job placed him at an increased risk of contracting or developing degenerative arthritis of the left hip than the general public not so employed.

Plaintiff attempts to assert on appeal that the Commission was unfamiliar with the testimony of Dr. Cook and Dr. Benedict as reflected in the aforementioned findings of fact. However, there is no merit to this contention. Plaintiff specifically points to testimony by the doctors attributing the aggravation of the plaintiff's pre-existing arthritis to his job duties as evidence that the Commission erred in finding that plaintiff's injury was not caused by his employment. However, plaintiff confuses the distinction made by the Commission between the evidence regarding the employment causing the aggravation of the arthritis and the employment causing the arthritic condition.

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Neither doctor testified that plaintiff's employment caused his arthritis nor that his employment placed him at a greater risk for contracting arthritis. Therefore, the Commission's findings were sufficiently supported by competent evidence as to be affirmed on appeal.

[3] Plaintiff further argues that the Commission erred in failing to make additional findings as to causation and failing to make findings as to each element of an occupational disease claim.

However, “[t]he Commission is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead, the Commission must find those facts which are necessary to support its conclusions of law.” *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citations omitted). In addition, the Commission is not required to make findings of fact as to each element of an occupational disease claim upon denial. “The denial of compensation may be predicated upon the failure of the claimant to prove any one of the elements of compensability.” *Hansel v. Sherman Textiles*, 304 N.C. 44, 54, 283 S.E.2d 101, 107 (1981). Therefore, this assignment of error is overruled.

[4] Finally, plaintiff contends that the Commission erred in applying the standards set forth in *Futrell v. Resinall Corp.*, 151 N.C. App. 456, 566 S.E.2d 181 (2002), *aff'd*, 357 N.C. 158, 579 S.E.2d 269 (2003), ultimately concluding that plaintiff failed to prove his occupational disease claim. We disagree.

The North Carolina Supreme Court set forth in a *per curiam* opinion adopting the standards set forth in the majority opinion of the Court of Appeals in *Futrell* and again recently enumerated the standard for occupational disease claims in *Chambers v. Transit Mgmt.*, 360 N.C. 609, — S.E.2d — (2006) predicated upon a theory of aggravation.

A plaintiff seeking compensation for an occupational disease claim must establish that his disease or condition meets the following three criteria: (1) the condition is “characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged;” (2) the condition is “not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation;” and (3) there is “‘a causal connection between the disease and the [claimant’s] employment.’” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations

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omitted). Our Courts have “‘consistently defined the third element of the *Rutledge* test as being met where the [plaintiff] can establish that the employment caused him to contract the disease, or where he can establish that it significantly contributed to or aggravated the disease.’” *Chambers*, 360 N.C. at 613, — S.E.2d at —.

Previous cases from this Court have held that evidence of the aggravation of a pre-existing idiopathic condition caused by a claimant’s employment is sufficient to establish a causal connection for an occupational disease claim. *Ruffin v. Compass Grp. USA*, 150 N.C. App. 480, 484-86, 563 S.E.2d 633, 636-38 (2002). However, the Supreme Court in *Chambers* noted: establishing that one’s employment aggravated the disease only satisfies the evidentiary burden on the issue of causation. The employee must “‘nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public.’” *Chambers*, 360 N.C. at 613, — S.E.2d at —. It therefore follows that when a claimant asserts an occupational disease claim predicated on causation upon the issue of aggravation, the claimant must further show that his employment placed him at a greater risk for contracting the condition. *Chambers*, 360 N.C. at 613, — S.E.2d at —; *Rutledge*, 151 N.C. App. at 459-61, 566 S.E.2d at 183-84.

Plaintiff states that the application of this standard is inconsistent with previous case law articulated by this Court and the North Carolina Supreme Court. Plaintiff asserts that to require a claimant to further prove that one’s employment placed him at a greater risk for not only aggravating a pre-existing condition but also contracting a pre-existing condition would all but abrogate occupational disease claims asseverated on the premise of aggravation. However, this argument is one that is beyond the scope of this Court. We are bound to follow the precedent set by our Supreme Court and this action is better addressed in the legislature of our state.

No evidence was presented by either doctor presenting testimony to the Commission that plaintiff’s employment placed him at a greater risk for contracting degenerative arthritis. In fact, Dr. Cook testified that anyone, not only those who work in plaintiff’s trade or occupation, could have the potential to contract and could have osteoarthritis of the hip. Therefore, this assignment of error is overruled.

Accordingly, the opinion and award of the Commission is affirmed.

MORRIS v. GRAY

[181 N.C. App. 552 (2007)]

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

MELINDA LEE MORRIS, FORMALLY MELINDA MORRIS GRAY, PLAINTIFF V.
JERRY WILLIAM GRAY, DEFENDANT

No. COA06-234

(Filed 6 February 2007)

1. Appeal and Error— supporting arguments—not required in assignments of error

An appeal was not dismissed where the appellant did not cite authority in his assignments of error, but did so in his brief. Appellate Rule 28(b)(6) does not concern the assignments of error in the record; in fact, argument is specifically precluded from the assignments of error by Appellate Rule 10 (c)(1).

2. Courts; Divorce— amended Qualified Domestic Relations Order—no findings indicating reason for changing order of another judge

An amended Qualified Domestic Relations Order concerning a pension was remanded where there were no findings or statements by the trial judge to indicate his reasons for modifying the order. There is thus no evidence of a material change in circumstances that would warrant one trial court modifying, overruling, or changing the order of another.

Appeal by defendant-appellant from order entered 27 October 2005 by Judge Ted S. Royster, Jr. in District Court, Davidson County. Heard in the Court of Appeals 12 December 2006.

Michelle D. Reingold, for plaintiff-appellee.

C.R. "Skip" Long, Jr., for defendant-appellant.

WYNN, Judge.

Unless a material change of circumstances in the situations of the parties so warrants, one trial judge cannot modify, overrule, or

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change the judgment of another, equivalent trial judge.¹ Here, the record shows no findings indicating a material change of circumstances between the parties to necessitate modifying an earlier Qualified Domestic Relations Order (QDRO) entered by another District Court judge. Accordingly, we vacate the amended QDRO and remand for findings to support any necessary modifications to the earlier QDRO.

Defendant Jerry William Gray and Plaintiff Melinda Lee Morris married in 1982 and separated on 12 September 1998. The two subsequently divorced and resolved their claims for equitable distribution by consent in an order pursuant to memorandum of judgment, signed 22 September 2003. That order provided that Ms. Morris would receive “the marital portion of the US Airways, Inc. Defined Benefit Plan (Annuity),” namely “Fifty percent (50%) of the coverture period from December 12, 1982 through September 12, 1998 (per formula established in *Seifert v. Seifert*) with gains and losses thereon.” According to the parties’ briefs to this Court, Mr. Gray was furloughed from his position with US Airways following the entry of the equitable distribution order but prior to the entry of the QDRO required by the Employment Retirement Security Income Act (ERISA), 29 U.S.C. §§ 1001 *et seq.* (1999).

On 4 April 2005, District Court Judge Lynn Gullett entered a QDRO that assigned 48.9 percent of Mr. Gray’s accrued benefit, determined as of 12 September 1998, to Ms. Morris. The QDRO entitled Ms. Morris to have payments “in any form permitted under the terms of the Plan, including a single life annuity” based on her life, “but not including any form of joint and survivor annuity.” The QDRO also gave certain death benefits to Ms. Morris: (1) if Mr. Gray died before commencement of benefits to Ms. Morris, she would be deemed the “surviving spouse” for purposes of receiving fifty percent of death benefits payable to a surviving spouse, based on Mr. Gray’s accrued benefits as of 12 September 1998; (2) if Mr. Gray died after commencement of benefits to Ms. Morris, she would receive no death benefits and her benefits would cease unless she had elected to receive the single life annuity based on her life; and, (3) the charge of providing death benefit coverage to Ms. Morris would be charged against the portion of Mr. Gray’s accrued benefit assigned to Ms. Morris, namely, her 48.9 percent.

1. *Madry v. Madry*, 106 N.C. App. 34, 37-38, 415 S.E.2d 74, 77 (1992) (quotations and citations omitted).

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Neither party appealed the terms of the 4 April 2005 QDRO entered by Judge Gullett. Mr. Gray later filed for bankruptcy, as did US Airways, Inc., which had its pension plan taken over and administered by the Pension Benefit Guaranty Corporation (“Pension Corporation”). In an order signed 9 September 2005 and entered 17 October 2005, Ms. Gray was given relief from the automatic stay of proceedings against Mr. Morris while he was in bankruptcy, allowing her to proceed with processing the QDRO through the Pension Corporation. After a hearing with no testimonial evidence and no transcript, District Court Judge Ted S. Royster entered a QDRO on 17 October 2005, modifying the terms of the 4 April 2005 QDRO; he then entered an amended version on 27 October 2005, removing provisions for a contingent alternate payee. Differences between the April QDRO and the October Amended QDRO included adding the Pension Corporation as the named trustee of the pension plan, as well as removing the prohibition against Ms. Morris receiving any joint and survivor annuity and changing the way in which either Ms. Morris’s or Mr. Gray’s death would affect the payment of benefits.

Mr. Gray timely appealed from the 27 October 2005 Amended QDRO, arguing that the trial court erred and abused its discretion by (I) conducting a hearing and entering an order which effectively overruled another District Court judge; (II) conducting a hearing in the absence of any motion being filed by a party; (III) failing to make any findings of fact and/or conclusions of law as to why the previous QDRO should be substantially modified; and, (IV) entering a new QDRO that gave Ms. Morris more than what had been agreed to in the parties’ equitable distribution order and provided in an earlier QDRO.

[1] At the outset, we note that Ms. Morris repeatedly refers to North Carolina Rule of Appellate Procedure 28(b)(6) in her brief, arguing that Mr. Gray has abandoned the majority of his arguments by failing to cite to supporting authority in his assignments of error to this Court. However, Ms. Morris misapplies Rule 28(b)(6), which concerns the contents of the appellant’s brief to this Court, not the text of the assignments of error provided in the record. In his brief, Mr. Gray has indeed complied with Rule 28(b)(6) by presenting arguments to this Court which “contain citations of the authorities upon which the appellant relies.” N.C. R. App. P. 28(b)(6) (2005); *see also Coastal Plains Utils., Inc. v. New Hanover County*, 166 N.C. App. 333, 350, 601 S.E.2d 915, 926 (2004) (“Our appellate rules require that arguments of appellants ‘contain citations of the authorities upon which the appellant relies.’ ”).

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Moreover, contrary to Ms. Morris's assertions, an appellant is specifically precluded by Rule 10(c)(1) from including argument in his assignments of error. *See* N.C. R. App. P. 10(c)(1) (2005) ("Each assignment of error shall, so far as practicable, be confined to a single issue of law, and shall state plainly, concisely, and *without argumentation* the legal basis upon which error is assigned.") (emphasis added). Indeed, "[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1). Accordingly, we decline to dismiss this appeal on technical grounds and instead reach the merits of Mr. Gray's claims.²

[2] North Carolina has a well established rule that "no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge made in the same action." *Madry v. Madry*, 106 N.C. App. 34, 37-38, 415 S.E.2d 74, 77 (1992) (citing *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972))). An exception to this rule allows a subsequent trial judge to rehear an issue and enter a ruling "if there has been a material change in the circumstances of the parties and the initial ruling was one which was addressed to the discretion of the trial judge." *Atkinson v. Atkinson*, 132 N.C. App. 82, 88, 510 S.E.2d 178, 181 (citing *Madry*, 106 N.C. App. at 38, 415 S.E.2d at 77), *rev'd on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999); *see also Smith v. Beaufort County Hosp. Ass'n*, 141 N.C. App. 203, 218, 540 S.E.2d 775, 784 (2000) (Wynn, J., dissenting) ("In other words, there must be some basis for changing the [grounds underlying the order in question]; otherwise, I see no basis for one court modifying or overruling another equivalent court."), *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

2. We note again, however, the difficulty in applying our Supreme Court's ruling in *Viar v. N.C. Department of Transportation* to determine what might constitute "creat[ing] an appeal for an appellant." 359 N.C. 400, 402, 610 S.E.2d 360, 361, *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). *See also Bennett v. Bennett*, 180 N.C. App. ___, ___, 638 S.E.2d 243, 245-46 (Hunter, J., dissenting) (arguing that the assignments of error should not have been dismissed because "plaintiff was neither disadvantaged nor was the Court unduly burdened by the imprecise wording of defendant's assignments of error and failure to include the standard of review."); *Broderick v. Broderick*, 175 N.C. App. 501, 504, 623 S.E.2d 806, 808 (2006) (Wynn, J., concurring) ("[T]he cost of effectively denying our citizens *access to justice* in our appellate courts outweighs the benefits of strictly enforcing the technical requirements for assignments of error.").

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Here, neither party disputes the fact that the QDRO filed on 17 October 2005 and the amended version filed on 27 October 2005 changed the terms of the QDRO entered by a different trial judge on 4 April 2005. After reviewing the record, we can find no findings or statements by the trial judge that would indicate his reasons for modifying the terms of the earlier order. Both Ms. Morris and Mr. Gray offer possible explanations, including either to ensure that the QDRO accorded with the terms of the pension plan³ or to change the name of the plan's trustee—but their theories cannot substitute for the reasoning of the trial judge. Moreover, we note that, even if a change was warranted by the new status of the Pension Corporation as the plan's trustee, such an amendment is more appropriately made pursuant to a Rule 59 or 60 motion. *See* N.C. Gen. Stat. § 1A-1, Rules 59, 60 (2005) (allowing for the amendment of judgments due to factors such as errors in law or clerical mistakes).

In general, “[e]quitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citation omitted). This Court will find such an abuse of discretion only if “the judgment was unsupported by reason and could not have been a result of competent inquiry.” *Id.* Although we cannot say the trial judge did not engage in a competent inquiry in deciding to modify the terms of the earlier QDRO, we likewise cannot say that he did, in light of the absence of any findings or reasons stated in the record. We have no evidence before us of a “material change in circumstances” that would warrant the exception of one trial judge’s modifying, overruling, or changing the order of another.

Accordingly, we conclude that the trial judge erred in failing to make adequate findings to justify his modifications to the 4 April 2005. Because this is sufficient grounds to vacate the 27 October 2005 order, we do not address the remainder of Mr. Gray’s arguments. We therefore vacate the 27 October 2005 Amended QDRO and re-

3. In support of this contention, Ms. Morris points to a letter from Amy Rondeau, Senior Retirement Specialist with US Airways, that mentions their “conditional approval . . . based upon the understanding that you will make a conforming revision and delete the inapplicable language” of the draft QDRO. However, the letter is not dated and contains no specific reference as to which QDRO needs to be revised. Indeed, the letter appears to be part of Mr. Gray’s handwritten submission to the trial judge, objecting to the modified October 2005 QDRO, suggesting to us that Ms. Rondeau’s mention of a “conforming revision” refers to the October 2005 version, not the April 2005 version. As presented in the record to us, this partial, undated letter is insufficient and overly vague to prove a “material change in the circumstances.”

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mand this matter for such findings to be made on the record as necessary to support any modifications of the earlier QDRO required by law.

REMANDED.

Judges HUNTER and STEELMAN concur.

STATE OF NORTH CAROLINA v. DAVID ALAN BRADLEY

No. COA06-671

(Filed 6 February 2007)

1. Appeal and Error— assignments of error—record page references omitted—Rules violation not egregious

Violations of the Rules of Appellate Procedure involving the identification of assignments of errors by their record page numbers were not so egregious as to warrant dismissal or sanctions.

2. Sentencing— habitual impaired driving—no double jeopardy violation

Habitual impaired driving does not violate double jeopardy under *Apprendi v. New Jersey*, 530 U.S. 466. *Apprendi* and *Blakely* involve the right to a jury rather than double jeopardy.

3. Criminal Law— verdict sheet with alternate definitions of crime—one offense

There was no error in the submission of an impaired driving verdict sheet which did not specify which of two statutory definitions of impaired driving applied (being under the influence or blood alcohol level). Defendant was charged with a single wrong which could be established alternatively.

Appeal by defendant from judgment entered 19 January 2006 by Judge Robert C. Ervin in Cleveland County Superior Court. Heard in the Court of Appeals 11 January 2007.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Patricia A. Duffy, for the State.

Bruce T. Cunningham, Jr., for defendant-appellant.

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JACKSON, Judge.

On 25 July 2001, Sergeant James Christopher McClelland (“Sergeant McClelland”), a sixteen-year veteran of the North Carolina Highway Patrol, observed David Alan Bradley (“defendant”) turning left from a crossover onto U.S. 74 East. Sergeant McClelland noted that defendant’s “turn was so wide that he [defendant] went across that lane to the outside lane, almost went off the right side of the road, and he jerked it back.” Sergeant McClelland further testified that defendant’s vehicle crossed the fog line while turning onto U.S. 74. After following defendant’s vehicle for approximately three-tenths of a mile and observing defendant driving erratically and weaving in his lane, Sergeant McClelland activated his blue lights.

Defendant pulled his vehicle into a mall parking lot, and Sergeant McClelland approached defendant’s vehicle and requested defendant’s license and registration. Defendant was unable to produce a driver’s license. Sergeant McClelland then asked defendant to step out of his vehicle, whereupon Sergeant McClelland noticed that defendant had red, glassy eyes and a strong odor of alcohol on his breath. Sergeant McClelland requested that defendant take a seat in the patrol car and perform several field sobriety tests, including an AlcoSensor test and a horizontal gaze nystagmus test.

Based upon his observations, Sergeant McClelland formed the opinion that defendant “had consumed an [sic] sufficient amount of an alcoholic beverage as to appreciatively impair his mental and physical faculties,” and thus, Sergeant McClelland placed defendant under arrest. At the Law Enforcement Center, defendant was advised of his Intoxilyzer rights, and defendant exercised his right to make a telephone call. After waiting the required thirty minutes, Sergeant McClelland administered the Intoxilyzer test, which resulted in a breath-alcohol concentration of 0.16.

On 14 March 2005, defendant was indicted for habitual impaired driving. Prior to trial, defendant made a motion to dismiss the indictment on double jeopardy grounds. The trial court denied the motion on 12 July 2005, and the jury found defendant guilty on 16 January 2006. On 19 January 2006, the trial court sentenced defendant, as a prior record level II offender, to a minimum of fifteen months imprisonment with a corresponding maximum of eighteen months. Defendant filed timely notice of appeal.

[1] As a preliminary matter, we note that defendant’s brief violates Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure.

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Specifically, defendant has failed to identify his assignments of errors “by the pages at which they appear in the printed record on appeal.” N.C. R. App. P. 28(b)(6) (2006); *see, e.g., Perry v. N.C. Dep’t of Corr.*, 176 N.C. App. 123, 125, 625 S.E.2d 790, 791-92 (2006) (“Although DOC included a reference to the assignments of error in its brief, it did not reference the pertinent page numbers of the record on appeal.”). Although the assignments of error can be found on pages twenty-three to twenty-four of the record, the appellate rules expressly require the appellant to direct this Court’s attention to the pages in the record. “The North Carolina Rules of Appellate Procedure are mandatory and ‘failure to follow these rules will subject an appeal to dismissal.’” *Viar v. N.C. Dep’t of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (per curiam) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)), *reh’g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Nevertheless, we conclude that defendant’s violation is not so egregious as to warrant dismissal or sanctions.

[2] On appeal, defendant first contends that the offense of habitual impaired driving violates the prohibition against double jeopardy as a result of the United States Supreme Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). We disagree.

“A person commits the offense of habitual impaired driving if he drives while impaired as defined in [North Carolina General Statutes, section] 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in [section] 20-4.01(24a) within seven years of the date of this offense.” N.C. Gen. Stat. § 20-138.5(a) (2005). The habitual impaired driving statute is intended to provide an increased sentence for someone convicted of a fourth impaired driving offense, with the previous three offenses occurring within seven years of the fourth offense.

In 2001, this Court upheld the habitual impaired driving statute against a double jeopardy challenge. *State v. Vardiman*, 146 N.C. App. 381, 552 S.E.2d 697 (2001), *appeal dismissed*, 355 N.C. 222, 559 S.E.2d 794, *cert. denied*, 537 U.S. 833, 154 L. Ed. 2d 51 (2002). In *Vardiman*, this Court noted that “[i]t is well settled that the Double Jeopardy Clause of the North Carolina and United States Constitutions protect against . . . multiple punishments for the same offense.” *Id.* at 383, 552 S.E.2d at 699 (internal quotation marks and citations omitted). Recidivist statutes, such as habitual driv-

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ing, “survive constitutional challenges in regard to double jeopardy challenges because they increase the severity of the punishment for the crime being prosecuted; *they do not punish a previous crime a second time.*” *Id.* (emphasis added).

Defendant nevertheless argues that “the underpinning of the majority opinion in *Vardiman* that Habitual DWI is both a crime and a sentence enhancer has been removed by the *Apprendi/Ring/Blakely* line of cases and that *Vardiman* is no longer good law.” *Vardiman* was decided after the United States Supreme Court’s opinion in *Apprendi* was filed, and this Court noted that *Apprendi* did not alter its conclusion that the habitual impaired driving statute survived a double jeopardy challenge. In addition, we recently addressed a similar double jeopardy challenge with respect to habitual misdemeanor assault in *State v. Massey*, 179 N.C. App. 803, 635 S.E.2d 528 (2006). In *Massey*, we held that

[a]lthough defendant contends that the *Apprendi* line of cases renders habitual misdemeanor assault unconstitutional as violative of the prohibition against double jeopardy, defendant reads too much into *Apprendi* and its progeny. *Blakely* explicitly permits sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury. In fact, the United States Supreme Court expressly permitted sentence enhancements imposed by a judge when the defendant stipulates to the relevant facts or consents to judicial fact-finding. As the North Carolina Supreme Court noted, the crux of *Blakely* was to eliminate fact finding by the court that increased a defendant’s sentence beyond the statutory maximum. In essence, *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements. Defendant’s argument, however, is directed at the *Fifth* Amendment prohibition against double jeopardy, and accordingly, *Apprendi* and *Blakely* are inapposite.

Massey, 179 N.C. App. at 808, 635 S.E.2d at 531 (internal citations omitted) (emphases in original). This Court refused to extend the holdings in *Apprendi* and *Blakely* to the habitual misdemeanor assault statute. Similarly, we refuse to extend those holdings to the habitual impaired driving statute. Accordingly, defendant’s assignment of error is overruled.

[3] In his second argument, defendant contends that the trial court erred by submitting a verdict sheet to the jury which did not differ-

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entiate between the two statutory definitions of the offense of impaired driving. Specifically, North Carolina General Statutes, section 20-138.1, provides that

[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:

- (1) While under the influence of an impairing substance; or
- (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more.

N.C. Gen. Stat. § 20-138.1(a) (2005). Because the verdict sheet did not specify which definition of impaired driving applied, defendant contends that the verdict sheet was ambiguous and therefore deprived him of his constitutionally protected right to a unanimous jury verdict. We disagree.

Because defendant did not object to the jury verdict sheet as submitted, we review defendant's argument under the plain error rule. *See State v. Gilbert*, 139 N.C. App. 657, 672, 535 S.E.2d 94, 103 (2000). Therefore, defendant must demonstrate

that the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). We note further that "[t]he plain error rule . . . is always to be applied cautiously." *Id.* (quoting *McCaskill*, 676 F.2d at 1002).

"The North Carolina Constitution and the North Carolina General Statutes both require an unanimous verdict in a criminal jury

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trial." *State v. Wallace*, 179 N.C. App. 710, 719, 635 S.E.2d 455, 462 (2006) (citing N.C. Const. art. I, § 24; N.C. Gen. Stat. § 15A-1237(b) (2005)). Defendant contends that his right to a unanimous jury verdict was violated because it is possible that some members of the jury found him guilty of impaired driving based on his being under the influence of an impairing substance, while other members of the jury might have based their decision on testimony indicating that defendant's alcohol concentration was 0.16, in excess of the 0.08 concentration delineated in the second prong of the impaired driving statutory definition.

In *State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996), our Supreme Court held that

[e]ven accepting defendant's argument as true, that some jurors may have found defendant was under the influence of an impairing substance and that some jurors may have found defendant's alcohol concentration was 0.08 or more at some relevant time after driving, *the fact remains that jurors unanimously found defendant guilty of the single offense of impaired driving.*

Oliver, 343 N.C. at 215, 470 S.E.2d at 24 (emphasis added). Here, defendant was charged with a single wrong that could be established alternatively through either of its elements, and thus, we find no error in the verdict sheet employed by the trial court. Accordingly, defendant's assignment of error is overruled.

Defendant's remaining assignments of error not argued in his brief are deemed abandoned. *See N.C. R. App. P. 28(b)(6)* (2006).

NO ERROR.

Judges CALABRIA and GEER concur.

BROWN v. GINN

[181 N.C. App. 563 (2007)]

CONNIE GINN BROWN, RALPH LEROY GINN, INDIVIDUALLY AND AS JOINT EXECUTRIX/EXECUTOR OF THE ESTATE OF HENRY LEE GINN, AND THE ESTATE OF HENRY LEE GINN, PLAINTIFFS v. LOUISE DIXON GINN, DEFENDANT

No. COA06-511

(Filed 6 February 2007)

Husband and Wife— antenuptial agreement—payments for ending tobacco allotments

Defendant disclaimed her rights to decedent's separate property as well as the income and proceeds from that property by the plain language of an antenuptial agreement, and the trial court correctly granted summary judgment for plaintiffs in an action seeking assignment to them of payments from the federal government for ending tobacco allotments.

Appeal by defendant from judgment entered 3 January 2006 by Judge Paul L. Jones in Greene County Superior Court. Heard in the Court of Appeals 15 November 2006.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiff-appellees.

White & Allen, P.A., by Richard J. Archie, for defendant-appellant.

HUNTER, Judge.

Louise Dixon Ginn ("defendant") appeals from judgment granting summary judgment to Connie Ginn Brown, Ralph Leroy Ginn and the Estate of Henry Lee Ginn ("plaintiffs"). Defendant contends the trial court misapplied the law in granting summary judgment to plaintiffs. After careful review, we affirm the judgment of the trial court.

On 12 July 2005, plaintiffs filed a complaint against defendant in Greene County Superior Court asserting several claims for relief, including breach of contract and specific performance. Both parties moved for summary judgment, which matter came before the trial court on 28 November 2005. The evidence presented to the trial court tended to show that plaintiffs are the children of Henry Lee Ginn ("Ginn") and Nannie Ruby Ham Ginn, who died 10 January 1990. Following his wife's death, Ginn married defendant. Before defendant and Ginn married, however, they signed an antenuptial agreement ("the agreement") on 16 August 1990. In the agreement, defendant

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agreed to “waive[] and release[] all statutory rights that she has, or may have, in the property or estate of Ginn[.]” Ginn and defendant also agreed that “each party shall separately retain all rights in his or her own property, (and any proceeds or interest therefrom and any increase in value thereof) whether now owned or hereafter acquired”

Ginn was a tobacco farmer who owned his tobacco farm, tobacco barn, and residence before marrying defendant. As a tobacco farmer, Ginn received tobacco crop allotments from the federal government. Ginn died on 7 January 2005. In his last will and testament, Ginn devised the ten-acre residential portion of his farm to defendant, but stated he did “not intend for any crop allotments of any kind to go with the approximately 10 Acres which are being devised to my said wife and I do specifically withhold any such crop allotments from said devise.” Plaintiffs were devised equal portions of the remaining 178 acres of the tobacco farm.

On 22 October 2004, the Fair and Equitable Tobacco Reform Act of 2004 (“FETRA”) was signed into law. 7 USCA § 518 et. seq. (2005). With the FETRA, the federal government ended the program under which Ginn received his tobacco allotments. *Tobacco Transition Payment Program*, 70 Fed. Reg. 17150 (2005) (codified at 7 C.F.R. §§ 723, 1463-64). In consideration for ending the program, the FETRA allowed Tobacco Transition Payment Program payments (“TTPP payments”) to be awarded to qualified farmers. 7 USCA § 518a(a) (2005). The Farm Service Agency (“FSA”), a division of the United States Department of Agriculture (“USDA”), was charged with management of the distribution of these TTPP payments. 7 CFR 1463.101(a) (2005). The FSA did not accept applications for TTPP payments until 14 March 2005, approximately three months after Ginn’s death. 70 Fed. Reg. at 17156 (2005).

Both defendant and plaintiffs made applications to the FSA for these payments shortly before the 17 June 2005 deadline. The FSA determined that Ginn’s farm qualified for TTPP payments and valued them at \$65,569.00. The FSA awarded defendant, not plaintiffs, the TTPP payments. The decision was based on Section 518a(f) of the FETRA, which states:

If a tobacco quota holder who is entitled to contract payments under this section dies and is survived by a spouse or one or more dependents, the right to receive the payments shall transfer to the

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surviving spouse or, if there is no surviving spouse, to the estate of the tobacco quota holder.

7 USCS § 518a(f) (2005). Part 1463.111(a) of the USDA's final rule was also pertinent:

TPPP payments made to any person under this subpart shall be made without regard to questions of title under State law and without regard to any claim or lien against the tobacco quota, tobacco marketing allotment, or the farm for which a tobacco quota had been established . . . by any creditor or any other person.

70 Fed. Reg. at 17165 (codified at 7 C.F.R. § 1463.111(a)).

Plaintiffs then filed the current action in North Carolina state court. In their complaint, plaintiffs did not challenge the FSA's decision to award defendant the TPPP payments. Instead, plaintiffs alleged that defendant must assign them the TPPP payments pursuant to the terms of the antenuptial agreement.

Upon reviewing the evidence, the trial court agreed that plaintiffs were entitled to summary judgment and entered judgment requiring a constructive trust for the benefit of plaintiffs to be placed upon some of the TPPP payments, and requiring defendant to assign the remaining TPPP payments to plaintiffs. Defendant appeals.

Defendant appeals from the granting of summary judgment. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). The Court reviews the matter *de novo* to determine whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340-41, 601 S.E.2d 915, 920 (2004). As there is no dispute as to any of the material facts before the Court, the issues raised in this appeal are matters of law.

Defendant's primary argument is that the federal law and accompanying regulations preempts state intestate law and enforcement of the agreement. In particular, defendant argues that section 518a(f) of the FETRA, which requires TPPP payments to go to the surviving spouse, preempts state law. Since this section controls, defendant

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contends, once she receives the TPPP payments as the surviving spouse, such payments should be free of any further claim by plaintiffs. We do not agree.

Defendant's preemption argument is misguided here. The pertinent issue is not whether the FSA correctly distributed the TPPP payments to defendant, but whether defendant is bound by the terms of the antenuptial agreement to assign the payments to plaintiffs. The FSA awarded defendant the TPPP payments "without regard to questions of title under State law and without regard to any claim or lien against the tobacco quota, tobacco marketing allotment, or the farm for which a tobacco quota had been established . . . by any creditor or any other person." 70 Fed. Reg. at 17165 (codified at 7 C.F.R. § 1463.111(a)). It is now a question for our state courts to determine whether plaintiffs have a legitimate claim on the payments made to defendant. Nothing in the FSA limits plaintiffs' ability to seek appropriate redress under state law; rather, the FSA

provisions are in place for administrative ease. The government will pay the eligible quota holder or [transferee] "without regard to questions of title under State law and without regard to any claim or lien against the tobacco quota" so that it does not have to bother with conflicting claims over payment. . . . By setting up a method of payment, the Secretary of Agriculture is not abrogating the rights of [plaintiffs] under state law.

In re Evans, 337 B.R. 551, 561 (Bankr. E.D.N.C. 2005) (holding that a preemption argument was not persuasive, in that nothing in the FSA prevented creditors from filing claims against TPPP recipients under state law once TPPP payments were made to eligible debtors).

In the complaint, rather than dispute the FSA's decision, plaintiffs alleged that defendant breached the agreement when she refused to assign the payments to them. This allegation raises a question of state law, not a question requiring interpretation of federal law, and thus the FETRA and the federal law of preemption have no bearing here. We therefore consider whether defendant is obligated under the terms of the antenuptial agreement to turn over to plaintiffs the TPPP payments she received.

Defendant acknowledges that the antenuptial agreement is legitimate and binding, but contends she did not waive her rights to the TPPP payments under the terms of the agreement. "The principles of construction applicable to contracts also apply to premarital agree-

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ments[.]’’ *Roberts v. Roberts*, 173 N.C. App. 354, 357, 618 S.E.2d 761, 764 (2005) (citations omitted). Contracts are interpreted according to the intent of the parties. *Tyndall-Taylor v. Tyndall*, 157 N.C. App. 689, 691, 580 S.E.2d 58, 60 (2003). The intent of the parties is determined by examining the plain language of the contract. *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999). Extrinsic evidence may be consulted when the plain language of the contract is ambiguous. *Tyndall-Taylor*, 157 N.C. App. at 691-92, 580 S.E.2d at 61. Our courts have held that parties to premarital agreements may freely relinquish all rights to each others’ property. *See, e.g., Prevatte v. Prevatte*, 104 N.C. App. 777, 411 S.E.2d 386 (1991) (upholding waiver of rights to equitable distribution in absolute release of property rights).

The agreement signed by defendant in the instant case does not explicitly reference TPP payments, but its plain language and broad scope illustrate the intent of the parties as to the payments. Article I of the agreement states that “each party shall separately retain all rights in his or her own property, (**and any proceeds or interest therefrom and any increase in value thereof**) whether now owned or hereafter acquired[.]” (Emphasis added.) The tobacco farm was the separate property of Ginn before the marriage. By the plain language of the provision, defendant disclaimed her rights to Ginn’s separate property, as well as income and proceeds from that property. Both his tobacco allotments and the TPP payments are derived from the farm, Ginn’s separate property. Thus, defendant disclaimed all rights to the TPP payments under the plain language of article I of the agreement.

Numerous other provisions in the agreement further indicate defendant’s waiver of rights to the TPP payments. For example, in article III, defendant “waive[d] and release[d] all statutory rights that she has, or may have, in the property or estate of Ginn[.]” FETRA section 518a(f), a federal statute, provides her the right to the TPP payments. By waiving her statutory rights to Ginn’s property, defendant waived the right to the TPP payments. Article VIII of the agreement states that “all property whether real, personal, or mixed, tangible or intangible which is solely in the name of either party at the time of the marriage shall be considered as belonging solely to the party whose name is on the property and the other party . . . shall have no rights in said property.” Moreover, article X of the agreement “bind[s] and inure[s] to the benefit of the parties and their respective legal representatives, heirs, successors, and assigns.” As plaintiffs are Ginn’s

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heirs, legal representatives of his estate, and successors in ownership of the farm, the TPP payments rightfully belong to them under the plain language of this last provision. The plain language of these provisions sufficiently demonstrates defendant's intent to waive her rights to the TPP payments. We therefore conclude the trial court correctly interpreted the terms of the antenuptial agreement and properly granted summary judgment in favor of plaintiffs. The judgment of the trial court is affirmed.

Affirmed.

Judges McCULLOUGH and ELMORE concur.

STATE OF NORTH CAROLINA v. TELLY SAVALAS COLEMAN

No. COA06-441

(Filed 6 February 2007)

Appeal and Error—appealability—*Blakely* error—case not pending on direct review—case final before *Blakely*

Defendant was not entitled to review under *Blakely v. Washington*, 542 U.S. 296 (2004), in a second-degree murder and robbery with a dangerous weapon case, because: (1) defendant's case was not pending on direct review when *Blakely* was decided; (2) defendant's case was final on 7 April 2004 before the 24 June 2004 decision in *Blakely* based on the fact that he failed to perfect a timely appeal; and (3) the granting of a petition for writ of certiorari does not alter the determination of when a case becomes final.

Appeal by defendant from judgment entered 24 March 2004 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 November 2006.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel P. O'Brien, for the State.

Brian Michael Aus, for defendant-appellant.

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JACKSON, Judge.

On the evening of 27 January 2000, Telly Savalas Coleman (“defendant”) approached a vehicle stopped momentarily in a parking lot. The vehicle was occupied by Byron Johnson (“Johnson”), seated in the driver’s seat, and Myron Harris (“Harris”), seated in the front passenger seat. Defendant asked Johnson if he had any marijuana for sale, and when Johnson replied that he did not, defendant produced a handgun and robbed Johnson of his gold necklace, his watch, and approximately \$300.00 in cash. Defendant then said to Johnson, “I know you’ve got something else. Don’t make me shoot you.” Johnson responded that he had given everything he had to defendant, but defendant shot Johnson twice, killing him. Defendant fled the scene, and after being located and interviewed by police the following day, defendant confessed to the shooting. Defendant, however, denied the robbery and contended that Johnson had pointed a gun at defendant moments before defendant approached Johnson’s vehicle. Nevertheless, defendant admitted that Johnson did not have a gun in his hands at the time defendant shot him.

On 6 March 2000, defendant was indicted for murder and robbery with a dangerous weapon. On 26 September 2000, defendant tendered an *Alford* plea to second-degree murder and robbery with a dangerous weapon as part of a plea agreement. After defendant stipulated to a Prior Record Level of III, Judge Shirley L. Fulton accepted the plea, and on 2 April 2001, Judge Fulton imposed consecutive sentences—an aggravated sentence of 248 to 307 months imprisonment for the murder charge and a presumptive sentence of 103 to 133 months for the armed robbery charge.

On 22 March 2002, defendant filed a motion for appropriate relief to have his sentence reviewed, and on 12 April 2002, Judge Fulton ordered a resentencing hearing. On 28 June 2002, Judge Fulton ruled that defendant’s original sentence of 248 to 307 months should stand. Judge Fulton did not enter any signed judgment concerning the resentencing.

On 8 January 2004, defendant filed a motion for appropriate relief seeking a new sentencing hearing, which was granted by Judge Robert P. Johnston by order entered 23 January 2004. On 24 March 2004, Judge James W. Morgan—for the express purpose of reducing Judge Fulton’s 28 June 2002 findings to writing—entered written findings of aggravating and mitigating factors consistent with Judge Fulton’s oral findings. Judge Morgan then entered a Judgment and

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Commitment, in which he sentenced defendant to an aggravated term of 248 to 307 months imprisonment for second-degree murder. The Judgment and Commitment expressly notes that “[t]his judgment is prepared to make a paper record of the judgment entered by Hornable [sic] Shirley L. Fulton 06/28/2002.” In open court, defendant entered notice of appeal from this judgment, but defendant never perfected this appeal.

On 25 January 2005, defendant filed a petition for writ of certiorari, which this Court dismissed on 11 February 2005. On 31 May 2005, defendant filed another petition for writ of certiorari, contending that the trial court committed structural error pursuant to *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), by sentencing him to an aggravated sentence for his conviction of second-degree murder. On 16 June 2005, this Court granted defendant’s petition for writ of certiorari for purposes of reviewing the judgment of 24 March 2004.

In 2004, the United States Supreme Court held that, with the exception of the fact of a prior conviction, trial courts may not increase a defendant’s sentence beyond the prescribed statutory maximum unless the facts necessary to support the enhancement are found by a jury or admitted to by the defendant. *See Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412. Last year, our Supreme Court held “that *Blakely* errors arising under North Carolina’s Structured Sentencing Act are structural and, therefore, reversible *per se*.¹ *Allen*, 359 N.C. at 444, 615 S.E.2d at 269. *Allen*, however, was withdrawn by order entered 17 August 2006 for re-consideration in light of the United States Supreme Court’s decision in *Washington v. Recuenco*, 548 U.S. —, 165 L. Ed. 2d 466 (2006). *See State v. Allen*, 360 N.C. 569, 635 S.E.2d 899 (2006).¹ In *Recuenco*, the United States Supreme Court concluded that “[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error,” and thus *Blakely* errors could be subjected to harmless error analysis. *Recuenco*, 548 U.S. at —, 165 L. Ed. 2d at 477. In reliance on *Recuenco*, our Supreme Court recently held that *Blakely* violations are reviewed under this harmless error analysis. *See State v. Blackwell*, 361 N.C. 41, 42, 638 S.E.2d 452, 453 (2006). As such, “we must determine from the record whether the evidence against the defendant was so ‘overwhelming’ and ‘uncontroverted’ that any ra-

1. On 5 September 2006, the Court granted the defendant’s motion to declare the matter moot. *See State v. Allen*, No. 485PA04-2, 2006 N.C. LEXIS 1006 (N.C. Sept. 5, 2006).

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tional fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Id.* at 49, 638 S.E.2d at 458.

Before reaching the issue of whether *Blakely* error has occurred, however, it first is necessary to determine whether defendant is entitled to *Blakely* review. This is significant because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *State v. Green*, 350 N.C. 400, 407, 514 S.E.2d 724, 729 (1999) (quoting *Teague v. Lane*, 489 U.S. 288, 309, 103 L. Ed. 2d 334, 355 (1989)). As this Court recently held, defendants entitled to *Blakely* review are only those whose cases were pending on direct review or were not yet final as of the date the *Blakely* opinion was issued. *See State v. Hasty*, 181 N.C. App. 144, 147, 639 S.E.2d 94, 96 (2007).

In the case *sub judice*, defendant was indicted on 6 March 2000, well before the 24 June 2004 decision in *Blakely*. Defendant's case was not pending on direct review when *Blakely* was decided, and it appears that defendant's case was "final" before the 24 June 2004 decision in *Blakely*. As such, defendant is not entitled to *Blakely* review.

As this Court has held, a case is "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for petition for *certiorari* elapsed or a petition for *certiorari* finally denied." *State v. Simpson*, 176 N.C. App. 719, 722, 627 S.E.2d 271, 274 (quoting *State v. Zuniga*, 336 N.C. 508, 511 n.1, 444 S.E.2d 443, 445 (1994)), *disc. rev. dismissed*, 360 N.C. 653, 637 S.E.2d 191 (2006). Originally sentenced on 2 April 2001, defendant filed a motion for appropriate relief on 22 March 2002 and the trial court granted defendant's request for a resentencing hearing. At the hearing on 28 June 2002, the trial court made its findings and conclusions in open court and determined that defendant's original sentence should stand. Although the trial court rendered judgment at this hearing, the court did not file a written, signed judgment with the clerk of court, and as such, judgment was not entered at this time. *See Stachlowski v. Stach*, 328 N.C. 276, 282-83, 401 S.E.2d 638, 642-43 (1991) (distinguishing "rendering judgment" from "entering judgment"); *see also State v. Gary*, 132 N.C. App. 40, 42, 510 S.E.2d 387, 388 ("'Entry' of an order occurs when it is reduced to writing, signed by the trial court, and filed with the clerk of court."), *cert. denied*, 350 N.C. 312, 535 S.E.2d 35 (1999). On 8 January 2004, defendant filed another motion

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for appropriate relief, which was granted on 22 January 2004, and on 24 March 2004, the trial court filed a signed, written judgment, albeit for the express purpose of “mak[ing] a paper record of the judgment” from 28 July 2002. Accordingly, judgment was entered on 24 March 2004. Defendant, however, failed to perfect an appeal from this judgment, and thus, defendant’s time for appeal expired on 7 April 2004, fourteen days after judgment finally was entered. *See* N.C. R. App. P. 4(a) (2001) (providing that in order to preserve the right of appeal, defendants must give oral notice of appeal at trial or file a written notice of appeal within fourteen days after entry of the judgment or within fourteen days after a ruling on a motion for appropriate relief filed within the fourteen-day period following entry of the judgment).

Although we granted defendant’s 31 May 2005 petition for writ of certiorari, defendant’s case still was final as of 7 April 2004, prior to the *Blakely* decision on 24 June 2004. It is well-established that a “writ of *certiorari* is used . . . as a substitute for an appeal,” *State v. Moore*, 210 N.C. 686, 690, 188 S.E. 421, 424 (1936), but this Court has held that the granting of a petition for writ of certiorari does not alter the determination of when a case becomes final. *See, e.g., Hasty*, 181 N.C. App. at 147, 639 S.E.2d at 96 (“As defendant’s case was not pending on direct review and was final at the time the rule in *Blakely* was issued, the rule cannot be retroactively applied to defendant’s appeal before this Court by writ of certiorari.”). In *State v. Jones*, 158 N.C. App. 498, 500, 581 S.E.2d 103, 105, *cert. denied*, 357 N.C. 465, 586 S.E.2d 462 (2003), this Court found that the defendant failed to file a direct appeal within the time frame provided by Rule 4(a) of the Rules of Appellate Procedure. This Court held that “[d]efendant failed to give notice of appeal during this time frame and his case was not pending on appeal at the time of our Supreme Court’s decision in *Lucas*. Accordingly, the judgment in defendant’s case was final at the time the decision in *Lucas* was filed.” Furthermore, we noted that

[w]hile defendant’s petition for a writ of certiorari was granted by this Court on 11 March 2002, *this did not change the final judgment status of defendant’s case* for the purpose of *Lucas*. Since the decision in *Lucas* was expressly limited to cases that were not yet final, defendant’s argument is without merit.

Jones, 158 N.C. App. at 501, 581 S.E.2d at 105 (emphasis added).

Similarly, defendant’s judgment was entered on 24 March 2004, and his case became final on 7 April 2004 when he failed to perfect a

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timely appeal. Therefore, we hold that defendant is not entitled to *Blakely* review, and accordingly, defendant is not eligible for a new sentencing hearing. Defendant's sentence, rendered on 28 July 2002 and formally entered on 24 March 2004, is hereby affirmed.

AFFIRMED.

Judges GEER and LEVINSON concur.

INLAND CONSTRUCTION COMPANY, PLAINTIFF-APPELLEE v. CAMERON PARK II,
LTD, LLC, DEFENDANT-APPELLANT

No. COA06-264

(Filed 6 February 2007)

Contracts— breach—summary judgment—lack of consideration—lack of change order

The trial court did not err in a breach of contract case by granting plaintiff general contractor's amended motion for summary judgment on the issue of who was responsible for the cost of installing an additional heating, ventilation, and air conditioning (HVAC) unit to the first floor of defendant's building, and by failing to grant defendant's motion for summary judgment, because: (1) defendant's assertion that an email from plaintiff's project manager created a contractual obligation on the part of plaintiff to perform the work without seeking payment from defendant is unavailing since the email was not supported by consideration; (2) defendant's reliance on the lack of a change order is without merit since all the evidence demonstrated that defendant initiated the additional HVAC work and its architect HRA determined how the issue would be resolved; (3) HRA was hired by defendant to provide the design work for the project, plaintiff was not responsible for providing any design services and had no contractual relationship with HRA, and neither party disputed that HRA as an agent of defendant instructed plaintiff to proceed with the work to address the cooling issue; and (4) defendant's defense of equitable estoppel is inapplicable when defendant failed to show how its position was changed prejudicially as a result of its reliance on the project manager's email.

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[181 N.C. App. 573 (2007)]

Appeal by Defendant from order entered 6 September 2005 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 17 October 2006.

Smith, Currie & Hancock LLP, by Gregory L. Shelton, for Plaintiff-Appellee.

Warren, Perry & Anthony, P.L.L.C., by Sue E. Anthony, for Defendant-Appellant.

McGEE, Judge.

Cameron Park II (Defendant), a North Carolina limited liability corporation, appeals from an order granting summary judgment in favor of Inland Construction Company (Plaintiff). We affirm.

Plaintiff and Defendant entered into a contract on 12 July 2002, whereby Plaintiff agreed to construct improvements to a building (the project) owned by Defendant. The improvements were to be provided according to the design of Defendant's architect, Robert E. Nussear, Jr. (Nussear), with HR Associates (HRA). The contract required that any "changes in scope, systems, kinds and quality of materials, finishes or equipment" be incorporated by change order. The dispute at issue in this case is who was responsible for the cost of installing an additional heating, ventilation, and air conditioning (HVAC) unit to the first floor of the building.

As originally designed, the project included two phases. Phase one involved improvements to the first floor of the building, including the installation of a four ton HVAC unit. Phase two was to involve improvements to the second floor of the building, including the installation of multiple HVAC units, and a restaurant. However, after phase one of the project was completed, Defendant eliminated phase two. The elimination of phase two left only the four ton HVAC unit that had been installed on the first floor to cool the space. Defendant also increased the lighting on the first floor, but did not inform HRA of the additional lighting. All parties agreed that the four ton unit was inadequate to cool the space.

Plaintiff, through its project manager, Ron Hawkins (Hawkins), proposed to replace the existing four ton HVAC unit with a 7.5 ton unit. HRA rejected that option and concluded that adding an additional four ton unit would be a better alternative. Hawkins sent an email (the Hawkins email) to Defendant on 6 June 2003 informing Defendant that the HVAC revisions would be made on 9 June 2003.

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The email further stated “[t]he cost for these revisions will be resolved between [Plaintiff] and [HRA]. The owner will have no cost associated with this change in the mechanical system.” According to Robert Johnson (Johnson), an owner of Defendant corporation, Plaintiff also verbally advised him that Defendant would not be responsible for the cost of the additional HVAC unit. No change order regarding the additional HVAC work was presented to Defendant prior to the completion of the work. Plaintiff arranged for the installation of an additional HVAC unit by a subcontractor.

Nussear contacted Plaintiff’s President, Jim Edwards (Edwards), in writing on 9 June 2003. Nussear disputed Hawkins’ conclusion that the cost of the additional HVAC unit would be resolved between Plaintiff and HRA. Nussear noted that HRA was working directly with Defendant, that no design-build relationship existed between Plaintiff and HRA, and that Hawkins “assumed that a relationship exists between [Plaintiff] and HRA other than that of general contractor and architect working for an owner.” Nussear also stated that “the cooling problem [was] caused by changes to the project scope that occurred after the design was complete.” Nussear reiterated the substance of these concerns in another letter dated 18 June 2003.

Plaintiff requested payment in the amount of \$9,924.50 for the installation of the additional HVAC unit. Defendant refused payment based upon the Hawkins email. Plaintiff filed a complaint on 24 September 2003 alleging, *inter alia*, breach of contract. Defendant answered, asserting affirmative defenses including equitable estoppel, and a counterclaim. Defendant filed a motion for judgment on the pleadings on 25 May 2004. Plaintiff moved for summary judgment on 26 May 2004 and filed an amended motion for summary judgment on 24 June 2004. Plaintiff’s amended motion for summary judgment was supported by the affidavits of Edwards and Nussear. Defendant’s motion for judgment on the pleadings was supported by the affidavits of Hawkins and Johnson.

Both motions were heard by the trial court on 6 July 2004. In an order filed 6 September 2004, the trial court granted Plaintiff’s amended motion for summary judgment and denied Defendant’s motion for judgment on the pleadings. The trial court stated: “Plaintiff is entitled to recover from . . . Defendant the sum of \$9,924.50 for the additional HVAC unit’s installation required as a result of . . . Defendant’s decision not to complete the second story part of the project as originally designed, together with interest as allowed by law.” Defendant appeals.

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Defendant argues that the trial court erred by granting Plaintiff's amended motion for summary judgment. Defendant contends that no express or implied contractual obligation required Defendant to pay for the extra HVAC work. Defendant further relies on the absence of a change order for the extra HVAC work to support its position that it was not responsible for the cost of the additional HVAC unit.

Similarly, Defendant also argues that the trial court erred by failing to grant its motion for judgment on the pleadings which, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), was converted to a motion for summary judgment when the trial court heard and received evidence outside the pleadings. Defendant asserts that the Hawkins email created an express contract as to the additional HVAC unit and argues that the following facts demonstrate that the trial court should have granted summary judgment in Defendant's favor: (1) Hawkins represented to Defendant that Defendant would bear no cost associated with the change to the HVAC system; (2) Defendant reasonably relied on the representation by Hawkins; (3) the contract required a change order for alterations in the contracted work and no change order was obtained for the change to the HVAC system; and (4) the change to the system was made after Defendant was advised that it would bear no financial responsibility for the costs associated with the change. Because of the significant overlap in Defendant's arguments, we address them together.

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "The party moving for summary judgment bears the burden of bringing forth a forecast of evidence which tends to establish that there is no triable issue of material fact." *Creech v. Melnik*, 347 N.C. 520, 526, 495 S.E.2d 907, 911 (1998). The nonmoving party must respond with a forecast of evidence demonstrating an ability to make out a *prima facie* case at trial. *Id.*

Defendant's assertion that the Hawkins email created a contractual obligation on the part of Plaintiff to perform the work without seeking payment from Defendant is unavailing. As Plaintiff points out, the Hawkins email was not supported by consideration. "An enforceable contract is one supported by consideration." *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337, 337 S.E.2d 132, 134 (1985). "[A] mere promise, without more, is unenforceable." *Id.* at

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338, 337 S.E.2d at 134. Consideration consists of “any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee[.]” *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 215, 274 S.E.2d 206, 212 (1981). The Hawkins email is not supported by consideration and is therefore unenforceable.

Furthermore, Defendant’s reliance on the lack of a change order is without merit. This Court has held that

provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. This principle has been sustained even where the instrument provides for any modification of the contract to be in writing.

Graham and Son, Inc. v. Board of Education, 25 N.C. App. 163, 167, 212 S.E.2d 542, 544-45, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975) (internal citations omitted). All the evidence demonstrates that Defendant initiated the additional HVAC work, and its architect, HRA, determined how the issue would be resolved. In *Grading Co. v. Construction Co.*, 27 N.C. App. 725, 729, 221 S.E.2d 512, 515 (1975), cert. denied, 289 N.C. 296, 222 S.E.2d 695 (1976), this Court held that a defendant was properly held liable for work done as a result of an oral modification where “the so-called ‘extra’ . . . work was performed at the request and under the supervision of [the] defendant’s engineer.” Thus, in the present case, Defendant cannot rely on the need for a change order.

Neither party disputes that the project was organized in a traditional method of project delivery wherein Defendant contracted separately with an architect for design services and with Plaintiff for construction services. HRA was hired by Defendant to provide the design work for the project, and Plaintiff was not responsible for providing any design services and had no contractual relationship with HRA. Further, neither party disputes that HRA, as an agent of Defendant, instructed Plaintiff to proceed with the work to address the cooling issue. Therefore, regardless of whether the inadequate HVAC capacity resulted from Defendant’s choice to delete the second phase of the project, or from a design defect in HRA’s plans, Defendant is still responsible for payment of the work completed by Plaintiff under the contract. Therefore, to prevail, Defendant must do so by way of its equitable estoppel argument.

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Our Supreme Court has said

[w]here there is but one inference that can be drawn from the undisputed facts of a case, the doctrine of equitable estoppel is to be applied by the court. However, . . . where the evidence raises a permissible inference that the elements of equitable estoppel are present, but where other inferences may be drawn from contrary evidence, estoppel is a question of fact for the jury, upon proper instructions from the trial court.

Creech, 347 N.C. at 528, 495 S.E.2d at 913 (internal citations omitted). “The conduct of both parties must be weighed in the balance of equity, and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue.” *Id.* at 529, 495 S.E.2d at 913. A party claiming equitable estoppel must show “(1) lack of knowledge and the means of knowledge of the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 470, 556 S.E.2d 331, 336 (2001).

Even assuming, *arguendo*, that Defendant can satisfy the first two elements, Defendant’s evidence fails to show how it changed Defendant’s position prejudicially. Defendant’s evidence acknowledges the need for the additional HVAC unit and demonstrates that Defendant initiated resolution of the cooling issue. No dispute exists regarding whether the additional HVAC unit was in fact necessary to adequately cool the first floor of the building. Defendant’s evidence does not demonstrate any prejudicial change in position as a result of the Hawkins email. Therefore, Defendant’s equitable estoppel defense must fail, and the trial court properly granted summary judgment in favor of Plaintiff.

Affirmed.

Judges WYNN and McCULLOUGH concur.

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[181 N.C. App. 579 (2007)]

STATE OF NORTH CAROLINA v. MICHAEL REED REPLOGLE, II, DEFENDANT

No. COA06-152

(Filed 6 February 2007)

1. Homicide— involuntary manslaughter—culpable negligence—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of involuntary manslaughter, because a review of the evidence in the light most favorable to the State revealed that: (1) defendant was holding a gun like one does when shooting a gun, the gun discharged killing the victim, and the State's expert testified that the gun did not have a hair trigger and it could not have been fired without actually pulling the trigger; and (2) there was sufficient evidence of wantonness, recklessness, or other misconduct amounting to culpable negligence.

2. Appeal and Error— preservation of issues—constitutional issue—failure to raise at trial

The trial court did not err in an involuntary manslaughter case by failing to declare a mistrial when it was informed that the jury was having difficulty in reaching a verdict, because: (1) the constitutional issue of defendant's right to a jury trial was neither raised at the trial level nor assigned as error; and (2) plain error review is unavailable for this issue.

3. Constitutional Law— effective assistance of counsel—failure to move for mistrial

Defendant was not denied effective assistance of counsel in an involuntary manslaughter case based on his trial counsel's failure to move for a mistrial, because: (1) there was no reason to believe that such a motion would have been granted; and (2) any potential error was not so serious that a reasonable probability existed that the trial result would have been different absent the error.

4. Sentencing— restitution—unsworn statements of prosecutor

The trial court erred in an involuntary manslaughter case by ordering defendant to pay restitution to the victim's father in the amount of \$12,850, because: (1) the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing; (2) the unsworn statements of

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the prosecutor do not constitute evidence and cannot support the amount of restitution recommended; (3) even though defendant did not specifically object to the trial court's entry of an award of restitution, this issue was preserved for appellate review under N.C.G.S. § 15A-1446(d)(18); and (4) while it is true that silence under some circumstances may be deemed assent, a stipulation's terms must nevertheless be definite and certain in order to afford a basis for judicial decision.

Appeal by defendant from judgment entered 5 August 2005 by Judge Richard L. Doughton in Watauga County Superior Court. Heard in the Court of Appeals 19 October 2006.

Attorney General Roy Cooper, by Assistant Attorney General David P. Brenskelle, for the State.

L. Jayne Stowers, for defendant-appellant.

ELMORE, Judge.

Michael Replogle, II (defendant) appeals his conviction for involuntary manslaughter. After a careful review of the record, we find no error in defendant's conviction of involuntary manslaughter. However, because the State failed to produce any evidence on the issue of restitution at sentencing, we remand for resentencing on that issue.

Beginning 28 May 2005, defendant held a three-day unsupervised party at his house.¹ Defendant was sixteen years old at the time. On the morning of 30 May 2005, defendant, accompanied by his friends Jessica Parsons (Parsons), Tina Harmon (Harmon), and Tabitha Bumgardner (Bumgarnder), was unloading several guns in his living room. According to defendant, one of the guns jammed as he was attempting to remove a bullet from its chamber. As he struggled to dislodge the bullet, the gun went off, fatally shooting Bumgardner. Defendant was indicted for involuntary manslaughter, and was found guilty by a jury. He now appeals his conviction.

[1] Defendant first contends that the trial court erred in denying his motion for dismissal due to insufficient evidence. "In ruling on a defendant's motion to dismiss, the trial court should consider if the state has presented substantial evidence on each element of the

1. Although both the State and defendant discuss the party, what occurred there, and who was to blame for its occurrence in depth, we will not do so here. The events prior to the shooting have little to no bearing on the outcome of this case.

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crime and substantial evidence that the defendant is the perpetrator.” *State v. Fowler*, 353 N.C. 599, 621, 548 S.E.2d 684, 700 (2001) (citations omitted). “The elements of involuntary manslaughter are: (1) an unintentional killing; (2) proximately caused by either (a) an unlawful act not amounting to a felony and not ordinarily dangerous to human life, or (b) culpable negligence.” *State v. Hudson*, 345 N.C. 729, 733, 483 S.E.2d 436, 439 (1997) (citing *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985)). “The evidence should be viewed in the light most favorable to the state, with all conflicts resolved in the state’s favor. . . . If substantial evidence exists supporting defendant’s guilt, the jury should be allowed to decide if the defendant is guilty beyond a reasonable doubt.” *Fowler*, 353 N.C. at 621, 548 S.E.2d at 700 (citations omitted). Because the State provided sufficient evidence to send the case to the jury, defendant’s contention is without merit.

The State, both at trial and on appeal, relies primarily upon the following evidence: (1) that defendant was holding the gun “like one does when one shoots a gun,” (2) that the gun discharged, killing Bumgardner, and (3) that the State’s expert testified that the gun did not have a hair trigger and that it could not have been fired without actually pulling the trigger. Reviewing this evidence in the light most favorable to the State, we must agree with the State’s contention that this evidence was sufficient to justify the trial court’s denial of defendant’s motion.

There is no doubt that defendant unintentionally killed Bumgardner. Moreover, the State does not seriously contend that defendant was engaged in any sort of illegal activity at the time of the shooting. The sole issue before this Court is therefore whether defendant was culpably, or criminally, negligent.

Though not cited in either party’s brief, this Court has decided a case factually indistinguishable from the case at hand. *State v. McAdams*, 51 N.C. App. 140, 275 S.E.2d 500 (1981). In *McAdams*, the defendant was cleaning and oiling a recently purchased rifle while sitting on a couch with his wife. *Id.* at 142, 275 S.E.2d at 502. He loaded the weapon, and pointed it out the front of his house, which happened to be on the same side of him as his wife. *Id.* Noticing that the bolt of the gun was stuck in the back position the defendant slammed the bolt forward in an attempt to place it back in the forward position. *Id.* The gun fired, fatally shooting his wife. *Id.* The *McAdams* court, noting that “[c]ulpable negligence is more than the actionable negligence often considered in tort law, and is such recklessness or

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carelessness proximately resulting in injury or death as imports a thoughtless or needless indifference to the rights and safety of others,” concluded in that case that there was “sufficient evidence of wantonness, recklessness, or other misconduct amounting to culpable negligence to support a verdict of involuntary manslaughter.” *Id.* at 143, 275 S.E.2d at 502. Because we are unable to distinguish the present case from *McAdams*, we must hold that there was no error in the trial court’s decision.

[2] Defendant next contends that it was error or plain error for the trial court to fail to declare a mistrial when informed that the jury was having difficulty in reaching a verdict. This contention is without merit.

Defendant argues that although he failed to object at the trial level, the issue is nevertheless preserved for appeal as it affects his constitutional right to a jury trial. “Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.” *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) (citing *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988)). “[The] ‘scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant’s brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.’” *Walker v. Walker*, 174 N.C. App. 778, 781, 624 S.E.2d 639, 641 (2005) (quoting *Bustle v. Rice*, 116 N.C. App. 658, 659, 449 S.E.2d 10, 11 (1994)). Because the constitutional issue was neither raised at the trial level nor assigned as error, we will not consider it on appeal.² Moreover, plain error review is unavailable for this issue. See *State v. McCall*, 162 N.C. App. 64, 70, 589 S.E.2d 896, 900 (2004) (holding that plain error review is unavailable to appellants contending that the trial court failed to declare a mistrial because “the North Carolina Supreme Court has restricted review for plain error to issues ‘involving either errors in the trial judge’s instructions to the jury or rulings on the admissibility of evidence.’”). Accordingly, we decline to further address this assignment of error.

2. Defendant’s reliance on *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), is misplaced. As our Supreme Court explained, “The reference [to the state constitution in *Ashe*] was intended to convey no more than the seemingly obvious proposition that for a trial judge to give explanatory instructions to fewer than all jurors violated only the unanimity requirement imposed on jury verdicts by Article I, section 24.” *State v. McLaughlin*, 320 N.C. 564, 569, 359 S.E.2d 768, 772 (1987).

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[3] In a similar vein, defendant contends that he was denied effective assistance of counsel by his trial representation's failure to move for a mistrial. Because there is no reason to believe that such a motion would have been granted, this contention is without merit.

In order to prevail on an ineffective assistance of counsel claim, defendant must not only prove that his trial counsel was deficient, he must also show that the deficient performance prejudiced his defense. *See, e.g., State v. Augustine*, 359 N.C. 709, 718, 616 S.E.2d 515, 524 (2005). Defendant fails to establish that there was a likelihood of success had his trial counsel moved for a mistrial; he therefore fails to show ineffective assistance of counsel.

The issues of the length of deliberations and the possibility of jury deadlock are addressed in N.C. Gen. Stat. § 15A-1235 (2005). That statute allows a trial judge to declare a mistrial: "If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury." *Id.* at § 15A-1235(d). However, the use of the word "may" makes clear that the decision to do so is at the judge's discretion. "Contrary to defendant's contention that it was clearly incumbent upon the judge to declare a mistrial, this statute does not mandate the declaration of a mistrial; it merely permits it." *State v. Darden*, 48 N.C. App. 128, 133, 268 S.E.2d 225, 228 (1980) (internal quotations omitted). In fact, "the action of the judge in declaring or failing to declare a mistrial is reviewable only in case of gross abuse of discretion." *Id.*

Thus, even assuming that defendant's trial counsel *should* have moved for mistrial, the fact that defendant fails to show any likelihood of the trial court granting that motion precludes this Court from holding that defendant's counsel was ineffective. Simply put, any potential error was not "so serious that a reasonable probability exists that the trial result would have been different absent the error." *Augustine*, 359 N.C. at 718, 616 S.E.2d at 524 (quotations and citations omitted).

[4] Finally, defendant contends that the trial court erred in ordering him to make restitution to the victim's father in the amount of \$12,850.00. He claims that because the prosecutor provided the only information regarding the amount of restitution owed, and because such prosecutorial statements do not constitute evidence, he is entitled to a new hearing on the issue of restitution. Defendant further contends that the fact that he failed to object at trial does not make the issue unappealable. Defendant is correct in both assertions.

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It is uncontested that “[t]he amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing.” *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004) (quoting *State v. Wilson*, 340 N.C. 720, 726, 459 S.E.2d 192, 196 (1995)). Furthermore, this Court has held that the “unsworn statements of the prosecutor . . . [do] not constitute evidence and cannot support the amount of restitution recommended.” *State v. Buchanan*, 108 N.C. App. 338, 341 423 S.E.2d 819, 821 (1992).

The State concedes that there is recent case law “supportive of the defendant’s contention,” holding that even where a defendant does not “specifically object to the trial court’s entry of an award of restitution, this issue is deemed preserved for appellate review under N.C. Gen. Stat. § 15A-1446(d)(18).” *Shelton*, 167 N.C. App. at 233, 605 S.E.2d 228, 233 (citing *State v. Reynolds*, 161 N.C. App. 144, 149, 587 S.E.2d 456, 460 (2003)). However, the State argues that our Supreme Court’s recent opinion in *State v. Alexander*, 359 N.C. 824, 616 S.E.2d 914 (2005), necessitates our holding that defendant’s silence at trial bars his appeal of the issue. In this, the State is simply incorrect. *Alexander* speaks primarily to the issue of stipulation to prior record level. See, e.g., *id.* at 829, 616 S.E.2d at 918. Moreover, in *Alexander*, the trial court “asked defense counsel whether he would ‘stipulate to the worksheet’ to which defense counsel responded ‘Yes, sir.’” *Id.* at 826, 616 S.E.2d at 916. While it is true that “[s]ilence, under some circumstances, may be deemed assent,” a stipulation’s terms must nevertheless “be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them.” *Id.* at 828, 616 S.E.2d at 917 (quotations and citations omitted). In view of our recent decisions in *Shelton*, *Wilson*, and *Buchanan*, which go specifically to the issue of restitution, we are unpersuaded by the State’s attempt to broadly read *Alexander*. We therefore remand to the trial court with instructions to rehear the issue of restitution.

Accordingly, while we find no error in defendant’s conviction of involuntary manslaughter, we reverse on the issue of restitution and remand to the trial court for resentencing consistent with this decision.

No error in part, reversed and remanded with instructions in part.

Chief Judge MARTIN and Judge JACKSON concur.

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[181 N.C. App. 585 (2007)]

GARY ANDERSON SMITH, PLAINTIFF v. BRIAN O'NEAL HARRIS AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC., DEFENDANT

No. COA06-688

(Filed 6 February 2007)

**Insurance—underinsured motorist—highway patrol trooper—
injured while chasing fleeing suspect on foot**

The causal connection between a highway patrol trooper's broken ankle incurred while chasing defendant across a field on foot following a traffic stop and the use of defendant's underinsured vehicle is too tenuous to invoke the underinsured motorist coverage issued to the trooper.

Appeal by defendant from orders entered 31 May 2005 and 3 April 2005 by Judges J. Richard Parker and Cy Anthony Grant, Sr., respectively, in Pasquotank County Superior Court. Heard in the Court of Appeals 14 December 2006.

Teague & Glover, P.A., by Danny Glover, Jr., for plaintiff-appellee.

Baker, Jones, Daly & Carter, P.A., by Ronald G. Baker, for defendant-appellant.

JACKSON, Judge.

On 23 April 2002, Gary Anderson Smith ("plaintiff"), an employee of the North Carolina Highway Patrol, was on patrol on U.S. 17 in Pasquotank County, North Carolina. Plaintiff observed Brian Harris ("Harris") driving and not wearing a seatbelt. Plaintiff stopped the vehicle and asked Harris for his driver's license and registration. Harris produced the materials, and plaintiff returned to his patrol car to check the status of Harris' driving privilege. After learning that Harris' driving privilege had been suspended, plaintiff returned to Harris' vehicle and asked Harris to get into the passenger side of the patrol car. Plaintiff then got into the driver's side of the vehicle and informed Harris that he was under arrest for driving while his license was suspended. Plaintiff opened his door and began to get out of the car in order to go to the passenger side to handcuff Harris. As soon as plaintiff exited the vehicle, however, so did Harris, and Harris began running away across a field. Plaintiff gave chase, but after running approximately forty to sixty yards and almost catching up with

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Harris, plaintiff stepped either in a hole or on uneven ground, causing his foot to roll and his ankle to break.

Plaintiff had personal automobile insurance issued to him by North Carolina Farm Bureau Mutual Insurance Company (“defendant”), with effective dates of 14 December 2001 to 14 June 2002. The policy contained underinsured motorist coverage with coverage limits of \$100,000.00 per person. Harris had automobile liability insurance with Progressive Insurance Company (“Progressive”), with coverage limits of \$30,000.00 per person. Progressive paid plaintiff the applicable liability policy limit on Harris’ policy in exchange for a Covenant Not to Enforce Judgment. Plaintiff then made a claim under his underinsured motorist coverage with defendant, which defendant denied.

Plaintiff brought a personal injury action against Harris and defendant, and the complaint, including a motion to compel arbitration, was filed on 16 December 2004. On 16 February 2005, defendant filed an answer denying that there was underinsured motorist coverage applicable to plaintiff’s claim and asserting a counterclaim for a declaratory judgment determining that there was no such coverage. Progressive already had paid its policy limit to plaintiff, and no responsive pleadings were filed on Harris’ behalf. Default thus was entered against Harris on 23 March 2005. On 27 April 2005, plaintiff filed a motion for partial summary judgment on the issue of whether plaintiff was entitled to underinsured motorist coverage pursuant to defendant’s automobile liability insurance policy issued to plaintiff. Defendant, in turn, filed a motion for summary judgment on 28 April 2005. On 31 May 2005, the trial court granted plaintiff’s motion for partial summary judgment as well as plaintiff’s motion to compel arbitration.

On 24 March 2006, plaintiff and defendant arbitrated their dispute, and the arbitrators determined that plaintiff was entitled to recover \$75,000.00. On that same date, plaintiff filed a motion requesting the trial court to confirm the arbitration award and to include in its judgment plaintiff’s costs. On 3 April 2006, the trial court filed an order confirming the arbitration award and decreeing that plaintiff was entitled to recover from defendant \$75,000.00, reduced by the \$30,000.00 Progressive had paid to plaintiff. Thus, the court ordered defendant to pay plaintiff \$45,000.00 plus interest, as well as the costs incurred by plaintiff. Defendant filed timely notice of appeal.

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In its first argument, defendant contends that the trial court erred in denying its motion for summary judgment and in allowing the plaintiff's motion for partial summary judgment. We agree.

"On appeal from summary judgment, the applicable standard of review is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law." *Taylor v. Coats*, 180 N.C. App. 210, 212, 636 S.E.2d 581, 583 (2006). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). If there is any evidence of a genuine issue of material fact, a motion for summary judgment should be denied. See *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 471, 597 S.E.2d 674, 694 (2004). "[W]e review the record in a light most favorable to the party against whom the order has been entered to determine whether there exists a genuine issue as to any material fact." *BellSouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 80, 606 S.E.2d 721, 724, *disc. rev. denied*, 359 N.C. 629, 615 S.E.2d 660 (2005).

Plaintiff's personal automobile insurance policy included underinsured motorists coverage. Under this portion of the policy, defendant contracted to "pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured caused by an accident." The policy further provided that "[t]he owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle." Defendant argued before the trial court and contends on appeal that plaintiff's injury—specifically, his broken ankle—did not "arise out of the ownership, maintenance or use" of Harris' vehicle. The trial court disagreed with defendant, and "[o]ur review of the trial court's construction of the provisions of an insurance policy is *de novo*." *Smith v. Stover*, 179 N.C. App. 843, 845, 635 S.E.2d 501, 502 (2006) (citing *Bruton v. N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. 496, 498, 490 S.E.2d 600, 601-02 (1997)).

The central issue in the case *sub judice* is whether plaintiff's injury arose out of the ownership, maintenance, or use of Harris' vehicle. This Court has held that

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[i]n order for an injury to be compensable, there must be a causal connection between the use of the vehicle and the injury. This connection is shown if the injury is the *natural and reasonable consequence of the vehicle's use*. However, an injury is not a "natural and reasonable consequence of the use" of the vehicle if the injury is the result of something "*wholly disassociated from, independent of, and remote from*" the vehicle's normal use.

Scales v. State Farm Mut. Auto. Ins. Co., 119 N.C. App. 787, 790, 460 S.E.2d 201, 203 (1995) (emphases added) (quoting *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 22, 234 S.E.2d 206, 210-11 (1977)). "In the context of the interpretation of policies of insurance, this Court has adopted the ordinary meaning of the word 'use'; that is, to put into action or service, to carry out a purpose or action by means of, or to make instrumental to an end or process." *Dutch v. Harleysville Mut. Ins. Co.*, 139 N.C. App. 602, 607, 534 S.E.2d 262, 265 (2000) (internal quotation marks, citations, and alterations omitted).

In *Smith v. Stover*, 179 N.C. App. 843, 635 S.E.2d 501 (2006), this Court was presented with a set of circumstances similar to those in the case *sub judice*. In *Stover*, the plaintiff—a deputy sheriff—observed the defendant run a red light. *Id.* at 844 635 S.E.2d at 502.

Plaintiff pursued defendant until defendant's vehicle became stuck in a creek. Plaintiff stopped his vehicle. Defendant fired with a shotgun at plaintiff from his car, breaking the windshield but not injuring him. Plaintiff then exited his vehicle. Defendant exited his vehicle and ran into nearby woods. Defendant fired several times at plaintiff from the woods, striking and injuring plaintiff.

Id. The plaintiff subsequently filed a personal injury action against the defendant. *Id.* The plaintiff was covered by his employer's uninsured motorist coverage, and defendant's vehicle was uninsured. *Id.* The trial court in *Stover* determined that the plaintiff's injuries were covered by his uninsured motorist coverage. *Id.* This Court, however, reversed the decision of the trial court, noting that it is not enough that the injuries occurred "but for the use of the automobile." *Id.* at 846, 635 S.E.2d at 503 (quoting *Nationwide Mut. Ins. Co. v. Knight*, 34 N.C. App. 96, 100, 237 S.E.2d 341, 345 (1977)). In other words, it was not enough that the "[p]laintiff, being a law enforcement officer, attempted to stop the [uninsured] vehicle to enforce the laws of the

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State of North Carolina as they apply to motor vehicles" and that the plaintiff was injured during the course of the encounter. *Id.* This Court clarified that

if plaintiff had been injured in a motor vehicle collision that occurred in the course of the chase of defendant, the uninsured motorist coverage . . . would have been applicable. However, there was no connection between the ownership, maintenance, or use of the uninsured motor vehicle and defendant's intentional shooting of plaintiff.

Id. (citation omitted).

Much as in *Stover*, plaintiff's injury in the instant case was the result of something "wholly disassociated from, independent of, and remote from the vehicle's *normal use*." *Scales*, 119 N.C. App. at 790, 460 S.E.2d at 203 (emphasis added) (internal quotation marks and citation omitted). *Stover* is clear that the requisite causation for uninsured or underinsured motorist coverage is not triggered solely by the fact that a plaintiff is injured while attempting to enforce our state's motor vehicle laws. Here, the causal connection between plaintiff's broken ankle and the use of defendant's underinsured vehicle is too tenuous to invoke the underinsured motorist coverage issued to plaintiff by defendant. As such, we cannot agree that plaintiff's injury was "the natural and reasonable consequence" of the vehicle's use. *See id.*

Accordingly, we hold the trial court erred in finding that coverage existed under the underinsured motorist coverage portion of plaintiff's insurance policy with defendant. As a result, we need not address defendant's remaining assignment of error.

Reversed.

Judges CALABRIA and GEER concur.

WELLS v. CUMBERLAND CTY. HOSP. SYS., INC.

[181 N.C. App. 590 (2007)]

JAMES A. WELLS, GUARDIAN FOR FRANK WELLS, PLAINTIFF v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. AND S & R HEALTH CARE, INC., DBA OPEN ARMS REST HOME, DEFENDANTS

No. COA06-420

(Filed 6 February 2007)

1. Statutes of Limitation and Repose— incompetency—not tolled

The trial court did not err by granting summary judgment for defendant hospital based on the statute of repose for medical malpractice actions where plaintiff argued that the statute was tolled by his incompetency. The identical argument was raised and rejected in *Livingston v. Adams Kleemeir Hagan Hannah & Founts*, 163 N.C. App. 397. Although that case was resolved on several grounds, this argument was made, addressed, and rejected.

2. Appeal and Error— former decision of Court of Appeals—alleged faulty reasoning—no authority to overrule

A subsequent panel of the Court of Appeals had no authority to overrule a prior decision which plaintiff argued was based on faulty reasoning.

3. Appeal and Error— Court of Appeals opinion—retroactive application

Livingston v. Adams Kleemeir Hagan Hannah & Founts, 163 N.C. App. 397, applies retroactively.

Appeal by plaintiff from an order entered 28 November 2005 by Judge E. Lynn Johnson and appeal by defendant Cumberland County Hospital System, Inc. from an order entered 9 February 2006 *nunc pro tunc* as of 31 October 2005 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 12 December 2006.

Gill & Tobias, LLP, by Douglas R. Gill; H. Bright Lindler, for plaintiff-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mark E. Anderson, Charles George, and Jessica M. Lewis, for defendant-appellant.

WELLS v. CUMBERLAND CTY. HOSP. SYS., INC.

[181 N.C. App. 590 (2007)]

HUNTER, Judge.

James A. Wells, as guardian for Frank Wells (“plaintiff”), appeals from an order of the trial court granting summary judgment in favor of Cumberland County Hospital System, Inc. (“defendant”). Plaintiff argues the trial court erred in concluding that plaintiff’s suit was barred by the statute of repose. Defendant separately appeals from an order of the trial court denying its motion to dismiss. Defendant argues the trial court should have dismissed the case pursuant to Rules 9(j), 12(b)(6), and 41(b) of the North Carolina Rules of Civil Procedure due to plaintiff’s failure to secure a qualified expert witness. After careful review, we affirm the grant of summary judgment in favor of defendant.

On 18 August 2000, plaintiff filed a complaint against defendant in superior court alleging that defendant had failed to properly care for plaintiff during his hospital stay, resulting in serious pressure ulcers and other medical complications. Plaintiff alleged he was discharged from defendant hospital on 13 November 1995. Defendant subsequently moved to dismiss plaintiff’s complaint, arguing plaintiff failed to comply with Rule 9(j) of the North Carolina Rules of Civil Procedure. Defendant also filed a motion for summary judgment on the grounds that plaintiff’s complaint was untimely. The trial court denied defendant’s motion to dismiss, but granted the motion for summary judgment. Both plaintiff and defendant appeal.

[1] Plaintiff argues the trial court erred in granting summary judgment in favor of defendant. The standard of review of the grant of a motion for summary judgment is well established. Summary judgment is properly granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005); *Livingston v. Adams Kleemeier Hagan Hannah & Fouts*, 163 N.C. App. 397, 402, 594 S.E.2d 44, 48, *disc. review denied*, 359 N.C. 190, 607 S.E.2d 275 (2004). “‘An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.’” *Thompson v. First Citizens Bank & Tr. Co.*, 151 N.C. App. 704, 706, 567 S.E.2d 184, 187 (2002) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972)).

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Plaintiff argues his cause of action is not barred by the statute of repose, in that his incompetency tolled the statute. We do not agree. Section 1-15(c) of the North Carolina General Statutes provides that “a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action[.]” N.C. Gen. Stat. § 1-15(c) (2005). “[I]n no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action” *Id.*

In *Livingston*, the plaintiff made the identical argument as present plaintiff. Specifically, the plaintiff argued the trial court erred in granting summary judgment to the defendants on the basis that the claim was barred by the statute of repose, because, argued the plaintiff, the statute was tolled by incompetency. See *Livingston*, 163 N.C. App. at 407, 594 S.E.2d at 51. This Court rejected the plaintiff’s argument, noting that “a statute of repose ‘serves as an unyielding and absolute barrier that prevents a plaintiff’s right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce.’” *Id.* (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985)). The Court distinguished the two cases cited by the plaintiff in support of her argument, *Bryant v. Adams*, 116 N.C. App. 448, 448 S.E.2d 832 (1994) and *Osborne v. Annie Penn Memorial Hospital*, 95 N.C. App. 96, 381 S.E.2d 794 (1989), and concluded they were inapplicable to support the tolling of the statute of repose on the basis of incompetency. The Court held the statute of repose barred the plaintiff’s claim, notwithstanding a claim of incompetency, and overruled the plaintiff’s argument.

In the instant case, plaintiff’s argument is identical to the one expressly rejected by this Court in *Livingston*. Plaintiff nevertheless argues that because the Court in *Livingston* resolved the appeal on several grounds, the language regarding the tolling of the statute of repose is *obiter dictum* and does not control the outcome of the instant case. We do not agree. The plaintiff in *Livingston* specifically argued that the statute of repose was tolled by incompetency, a claim which the Court then addressed and expressly rejected and overruled. We overrule this argument.

[2] Plaintiff further argues that the reasoning of *Livingston* was faulty and should not be controlling. However, “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that prece-

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dent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.

State v. Jones, 358 N.C. 473, 487, 598 S.E.2d 125, 134 (2004). We have no authority to overrule this Court's prior decision in *Livingston*, and we therefore overrule plaintiff's argument.

[3] Finally, plaintiff argues that, if *Livingston* controls the outcome of the instant case, it should apply only prospectively rather than retroactively. Because plaintiff filed his complaint before the *Livingston* case was decided, plaintiff contends his case should be allowed to go forward. Plaintiff's position conflicts, however, with "the well-established judicial policy in North Carolina [that] decisions of the North Carolina Supreme Court 'are generally presumed to operate retroactively.'" *Dunleavy v. Yates Construction Co.*, 106 N.C. App. 146, 151-52, 416 S.E.2d 193, 196 (1992) (quoting *State v. Rivens*, 299 N.C. 385, 390, 261 S.E.2d 867, 870 (1980)). Decisions of the Supreme Court of North Carolina overruling former decisions are also presumed to operate retroactively. *Cox v. Haworth*, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981). We overrule this argument.

Plaintiff concedes that unless alleged incompetency operates to toll the statute of repose, his claim is barred in the instant case. Because the statute of repose is not tolled by a claim of incompetency, see *Livingston*, 163 N.C. App. at 407, 594 S.E.2d at 51, plaintiff's complaint was untimely filed, and the trial court did not err in granting summary judgment in favor of defendant. Given our resolution of plaintiff's appeal, we need not address defendant's argument that the trial court erred in denying its motion to dismiss.

Affirmed.

Judges WYNN and STEELMAN concur.

IN THE COURT OF APPEALS

ANIMAL LEGAL DEF. FUND v. WOODLEY

[181 N.C. App. 594 (2007)]

ANIMAL LEGAL DEFENSE FUND, PLAINTIFF-APPELLEE v. BARBARA WOODLEY AND ROBERT WOODLEY, DEFENDANTS-APPELLANTS

No. COA06-358

(Filed 6 February 2007)

1. Injunctions—permanent—unverified complaint—sufficiency

An unverified complaint was sufficient to obtain a permanent injunction in an animal cruelty case. N.C.G.S. § 19A-3, which requires verification, applies only to preliminary injunctions.

2. Constitutional Law—North Carolina—law and equity merged—private action for injunction

The statute allowing private actions for injunctions in animal cruelty cases (N.C.G.S. § 19A-1) was not unconstitutional under Article IV, Section 13 of the North Carolina Constitution (which provides that there shall be one form of action for the redress of private wrongs, called a civil action). While defendants contend that this provision limits the legislature's ability to create actions by statute, it merely abolished the distinction between actions at law and suits in equity.

Appeal by defendants-appellants from injunction and order entered 12 April 2005 by Judge Albert A. Corbett, Jr. in Lee County District Court. Heard in the Court of Appeals 19 October 2006.

Kilpatrick Stockton LLP, by Adam H. Charnes and James J. Hefferan, Jr., for the plaintiff-appellee.

Staton, Doster, Post & Silverman, by Norman C. Post, Jr., for the defendant-appellant.

ELMORE, Judge.

Barbara and Robert Woodley (defendants) appeal from an injunction forfeiting all rights in the animals possessed by defendants and the removal of the animals from defendants' control, and an order granting temporary custody of the animals to the Animal Legal Defense Fund (plaintiff), both of which were entered 12 April 2005 by Judge Albert A. Corbett, Jr. After careful review of the record, we find defendants' contentions on appeal to be without merit; we therefore affirm the trial court's order and injunction.

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On 23 December 2004, plaintiff filed a complaint against defendants seeking preliminary and permanent injunctions under North Carolina's Civil Remedy for Protection of Animals statute (Section 19A). N.C. Gen. Stat. § 19A-1 *et seq.* (2005). Plaintiff alleged that defendants had abused and neglected a large number of dogs (as well as some birds) in their possession. Defendants answered the complaint on 7 January 2005. On 13 January 2005, after the lower court reviewed the evidence, held two hearings, and visited defendants' property, Judge Resson O. Faircloth entered a preliminary injunction prohibiting defendants from any further violation of the statute, requiring defendants to properly maintain those parts of their property in which the animals were kept, and granting plaintiff access to defendants' property for the purpose of giving care to the animals.

On 12 April 2005, following a trial, Judge Corbett entered a permanent injunction and temporary custody order. Defendants, who were also charged and convicted criminally,¹ filed notice of appeal on 11 May 2005. For the reasons stated below, the injunction and order of the trial court is affirmed.

[1] Defendants first contend that the trial court lacked subject matter jurisdiction to hear the matter because plaintiff's complaint was not verified as required by N.C. Gen. Stat. § 19A-3. However, as plaintiff points out in its brief, § 19A-3 applies only to preliminary injunctions. In fact, the section is titled "Preliminary injunction," and no mention is made of permanent injunctions throughout the section. N.C. Gen. Stat. § 19A-3 (2005). Moreover, § 19A-4, titled "Permanent injunction," makes no mention of verified complaints; according to that section, the trial court is bound by N.C. Gen. Stat. § 1A-1, Rule 65. N.C. Gen. Stat. § 19A-4 (2005). Rule 65 is also devoid of any mention of a verified complaint requirement; indeed, this Court has held that verification of complaint is not a condition for issuance of an injunction under Rule 65. N.C. Gen. Stat. § 1A-1, Rule 65 (2005); *Moore v. Wykle*, 107 N.C. App. 120, 139, 419 S.E.2d 164, 176 (1992), *cert. denied*, 332 N.C. 666, 424 S.E.2d 405 (1992). Because defendants gave notice of appeal only for the permanent injunction entered 12 April 2005, and not the preliminary injunction entered 13 January 2005, the issue of whether it was error for the trial court to issue the preliminary injunction is not before this Court. Defendants' first assignment of error is without merit.

1. The civil and criminal trials were joined; defendants' appeal of their guilty verdicts is presently pending in the Superior Court.

ANIMAL LEGAL DEF. FUND v. WOODLEY

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[2] Defendants also argue that N.C. Gen. Stat. § 19A-1 is unconstitutional in that it purports to grant standing to persons who have suffered no injury. To support their contention, defendants rely on Article IV, Section 13 of the North Carolina Constitution, which states, “There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action . . .” N.C. Const. art. IV, § 13. This reliance, however, is misplaced. While defendants contend that “this provision places a constitutional limit on standing in civil actions to those individuals who have suffered some individualized and concrete harm,” they rely almost entirely on federal authority. However, as defendants themselves note, “North Carolina courts are not constrained by the ‘case or controversy’ requirement of Article 3 of the United States Constitution.” *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). Moreover, defendants, in maintaining that our Constitution restricts our legislature’s ability to give standing by statute, simply misinterpret the language of the Constitution. In actuality, “[t]his section abolished the distinction between actions at law and suits in equity, leaving such rights and remedies to be enforced in the one court, which theretofore had administered simply legal rights.” *Reynolds v. Reynolds*, 208 N.C. 578, 624, 182 S.E. 341, 369 (1935).

It is telling that our Supreme Court recently determined that our courts have subject matter jurisdiction of suits brought under Section 19A by organizations such as plaintiff. *See Justice for Animals, Inc. v. Lenoir Cty. SPCA, Inc.*, 168 N.C. App. 298, 304, 607 S.E.2d 317, 321 (2005) (“The trial court has subject matter jurisdiction pursuant to N.C. Gen. Stat. § 19A-2 over plaintiff’s claim to the extent it seeks an injunction against defendant by alleging the cruel treatment of animals, as defined in N.C. Gen. Stat. § 19A-1.”). Moreover, as defendants themselves note, this Court has recently held that Section 19A “express[es] the General Assembly’s intent that the broadest category of persons or organizations be deemed ‘[a] real party in interest’ when contesting cruelty to animals.” *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366, 371, 595 S.E.2d 773, 776-77 (2004). Because we hold that Article IV, Section 13 of the North Carolina Constitution merely “abolished the distinction between actions at law and suits in equity,” *Reynolds*, 208 N.C. at 624, 182 S.E. at 369, rather than placing limitations on the legislature’s ability to create actions by statute, defendants’ contention is without merit.

IN RE ME.B., M.J., Mo.B.

[181 N.C. App. 597 (2007)]

Defendants' remaining assignments of error were not argued in their brief. "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." *State v. McNeill*, 360 N.C. 231, 241, 624 S.E.2d 329, 336 (2006) (quoting N.C.R. App. P. 28(b)(6) and citing *State v. Augustine*, 359 N.C. 709, 731 n.1, 616 S.E.2d 515, 531 n.1 (2005)). Accordingly, we will not review defendants' unargued assignments of error. Having found no meritorious assignments of error, the judgment of the trial court is

Affirmed.

Chief Judge MARTIN and Judge JACKSON concur.

IN THE MATTER OF: ME.B., M.J., Mo.B.

No. COA06-853

(Filed 6 February 2007)

Appeal and Error— notice of appeal—required—appellate entries not sufficient

An appeal by a father whose parental rights had been terminated was dismissed where the record did not include a written notice of appeal. Mere appellate entries are not sufficient to preserve the right to appeal. Furthermore, respondent did not petition for a writ of certiorari.

Appeal by respondent-father from judgments entered 20 September 2005 by Judge W. Rob Lewis II in Bertie County District Court. Heard in the Court of Appeals 11 January 2007.

Gillam and Gillam, by M. Braxton Gillam III, for Bertie County Department of Social Services, petitioners-appellees.

Holtkamp Law Firm, by Lynne M. Holtkamp, for the Guardian ad Litem.

Richard E. Jester, for respondent-appellant.

IN RE ME.B., M.J., Mo.B.

[181 N.C. App. 597 (2007)]

JACKSON, Judge.

Jerry B. (“respondent”) appeals the trial court’s order filed on 20 September 2005 terminating his parental rights to Me.B., M.J., and Mo.B. (collectively, “the minor children”). For the reasons stated herein, we dismiss the appeal.

On 9 October 2000, the Bertie County Department of Social Services (“DSS”) received a report that respondent was abusing crack cocaine and was abusing the minor children by inappropriately fondling one or more of them. On 13 October 2000, DSS took the minor children into nonsecure custody based upon a petition alleging abuse and neglect. At the time, Mo.B. was five years old, Me.B. was four years old, and M.J. was less than two years old. On 8 December 2000, the trial court adjudicated the minor children neglected. The court found that the father was abusing alcohol and cocaine while taking medication for paranoid schizophrenia and that the combination of the controlled substances and psychotropic medications placed the children at risk. Specifically, the combination of alcohol, cocaine, and respondent’s medications “can intensify symptoms such as poor impulse control, hostility, paranoia, an increased seizure threshold, and poor judgment.” In its dispositional order filed on 27 July 2001, the trial court allowed supervised weekly visitation and required random drug testing and substance abuse counseling, with the goal of reunification with respondent.

Respondent initially was cooperative, and after two negative drug screens, respondent was permitted unsupervised visitation. In February 2001, however, several of respondent’s drug screens were returned as “unable to read” or “unsuitable” due to dilution. As a result, visitations once again were supervised, and respondent was ordered to submit to random unannounced drug tests administered in the presence of an employee of Roanoke Chowan Human Services. Respondent subsequently tested positive for cocaine in March, April, May, June, and July, and on several occasions, respondent refused to submit to testing.

From late 2001 until October 2002, however, respondent exhibited progress and DSS anticipated return of the children to respondent in October 2002. All drug screens from October 2001, through July 2002 were returned negative, and at a Permanency Planning Hearing on 22 August 2002, DSS continued to recommend reunification and also expressed the hope of phasing in unsupervised and overnight visits.

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On 10 October 2002, however, respondent tested positive for cocaine during a random drug screen, and consequently, unsupervised visits were ceased. On several occasions from November 2002 to February 2003, respondent refused DSS' requests that he submit to random drug tests. On 19 February 2003, respondent once again tested positive for cocaine. On 7 April 2003, the trial court found that respondent's attendance at group therapy was sporadic and noted that respondent's substance abuse counselor described respondent's behavior as "characteristic of one who has maintained the lifestyle of a user of controlled substances." Respondent described group therapy as "really boring" and continued to deny that he had a substance abuse problem.

On 14 March 2003, the trial court changed the permanency plan from reunification to adoption. Respondent always has professed a love and concern for his children, but the trial court nevertheless found that "[b]ecause of [respondent's] lack of progress after 26-1/2 months, further efforts to reunite the juvenile[s] with [their] father clearly would be futile and inconsistent with the juvenile[s'] need for a safe, permanent home within a reasonable period of time."

On 6 June 2003, DSS filed motions to terminate respondent's parental rights to the minor children. The trial court held hearings on 2 February 2005 and 29 July 2005, and on 20 September 2005, the trial court entered an order terminating respondent's parental rights.

On appeal, respondent contends that the trial court improperly blended the adjudication and disposition phases of the termination hearing. Respondent also contends that the trial court erred in making several findings of fact and conclusions of law. For the following reasons, however, we must dismiss the instant appeal.

"Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 1-279.1 (2003). Rule 3(b)¹ of the North Carolina Rules of Appellate Procedure provides that appeals of termination of parental rights shall be taken in the time and manner as set out in North Carolina General Statutes, section 7B-1113.² See N.C. R. App. P. 3(b) (2005). Section 7B-1113, in

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1. The instant appeal preceded the amendments to Rule 3 effective 1 May 2006.
 2. The motions in the instant case were filed prior to the 1 October 2005 effective date of the amendments repealing section 7B-1113.

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turn, provides that any party to a termination proceeding “may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in writing within 10 days after entry of the order.” N.C. Gen. Stat. § 7B-1113 (2003) (emphasis added).

It is well-established that “[w]ithout proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements even for good cause shown under Rule 2 [of the Rules of Appellate Procedure].” *Finley Forest Condo. Ass’n v. Perry*, 163 N.C. App. 735, 741, 594 S.E.2d 227, 231 (2004) (quoting *Bromhal v. Stott*, 116 N.C. App. 250, 253, 447 S.E.2d 481, 483 (1994), aff’d, 341 N.C. 702, 462 S.E.2d 219 (1995)); see also *In re A.L.*, 166 N.C. App. 276, 277-78, 601 S.E.2d 538, 538-39 (2004).

Here, the record on appeal does not contain a written notice of appeal. Although the record includes appellate entries entered on 22 September 2005 which indicate through boilerplate that defendant gave notice of appeal, mere appellate entries are insufficient to preserve the right to appeal. See *State v. Blue*, 115 N.C. App. 108, 113, 443 S.E.2d 748, 751 (1994) (holding that the defendant did not preserve his right to appeal where the record included appellate entries but did not include a written notice of appeal filed with the trial court).

Respondent failed to satisfy the jurisdictional requirement of filing a notice of appeal and including the same in the record on appeal. Furthermore, respondent has failed to petition this Court for a writ of certiorari requesting this Court to consider the merits of the appeal. Accordingly, we are without jurisdiction to hear this case, and therefore, we must dismiss the instant appeal.

DISMISSED.

Judges CALABRIA and GEER concur.

STATE v. ARTIS

[181 N.C. App. 601 (2007)]

STATE OF NORTH CAROLINA v. GREGORY REQUINT ARTIS, DEFENDANT

No. COA06-443

(Filed 6 February 2007)

Constitutional Law— double jeopardy—habitual misdemeanor assault—habitual felon statute—same argument previously rejected

Although defendant contends his convictions for habitual misdemeanor assault and under the habitual felon statute violate the Fifth Amendment's prohibition against double jeopardy, he is not entitled to a new trial, because: (1) the Court of Appeals has already rejected this argument; and (2) defendant has offered no other basis for reversal.

Appeal by defendant from judgments entered 23 January 2006 by Judge William C. Griffin, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 2 November 2006.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

Bruce T. Cunningham, Jr. for defendant-appellant.

GEER, Judge.

Defendant Gregory Requint Artis appeals from his conviction of malicious conduct by a prisoner and habitual misdemeanor assault and his sentencing as a habitual felon. His appeal rests solely on his contention that, under the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), the habitual felon and habitual misdemeanor assault statutes can no longer be considered sentence-enhancing statutes. Instead, according to defendant, they now must be viewed as setting out substantive crimes and, therefore, sentencing as a habitual felon or for habitual misdemeanor assault violates the Double Jeopardy Clause. Because our Court has already rejected such reasoning in *State v. Massey*, 179 N.C. App. 803, 635 S.E.2d 528 (2006), we uphold defendant's conviction and sentence.

On 23 August 2004, defendant was indicted for malicious conduct by a prisoner, habitual misdemeanor assault, and attaining the status

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of habitual felon. The charges arose from an incident that took place on 4 December 2003 at the Pitt County Detention Center in Greenville, North Carolina, where defendant was incarcerated. On 13 October 2004, defendant was found guilty of (1) throwing bodily fluids at a local government employee in the performance of his duties and (2) assault on a local government employee, which in turn supported a conviction of habitual misdemeanor assault. Defendant then pled guilty to being a habitual felon.

On appeal, this Court affirmed the convictions of malicious conduct by a prisoner and habitual misdemeanor assault, but concluded that the trial court had failed to comply with N.C. Gen. Stat. § 15A-1022(a) (2003) in connection with defendant's guilty plea as to his habitual felon status. *State v. Artis*, 174 N.C. App. 668, 677, 622 S.E.2d 204, 210 (2005), *disc. review denied*, 360 N.C. 365, 630 S.E.2d 188 (2006). The Court, therefore, vacated the habitual felon conviction and remanded for resentencing.

On remand, the State presented evidence that defendant had three prior felony convictions: two for habitual misdemeanor assault and one for felony eluding arrest.¹ After the jury found defendant guilty of being a habitual felon, the trial court sentenced defendant as a habitual felon to 168 to 211 months for the malicious conduct conviction and to a concurrent term of 151 to 191 months for the habitual misdemeanor assault conviction. Defendant timely appealed.

Relying exclusively on the *Apprendi* and *Blakely* decisions, defendant contends that his conviction for habitual misdemeanor assault and under the habitual felon statute violate the Fifth Amendment's prohibition against double jeopardy. Specifically, he argues that those two decisions have eliminated sentence-enhancement statutes, rendering all recidivist statutes substantive crimes with the result, according to defendant, that sentencing for either habitual

1. The habitual misdemeanor assault statute was amended in 2004 to prohibit the use of prior habitual misdemeanor assault convictions as predicate offenses for other recidivist statutes. *See* N.C. Gen. Stat. § 14-33.2 (2005) ("A conviction under this section shall not be used as a prior conviction for any other habitual offense statute."). The amended version of § 14-33.2 became "effective December 1, 2004, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this part are not abated or affected by this part, and the statutory provisions that would be applicable but for this part remain applicable to those prosecutions." 2004 N.C. Sess. Laws 186, sec. 10.2. Because the offenses at issue took place prior to 1 December 2004, the State was not barred from prosecuting a habitual felon charge against defendant based on his prior convictions for habitual misdemeanor assault.

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misdemeanor assault or as a habitual felon violates the Double Jeopardy Clause's prohibition against multiple punishments for the same offense.

Defendant recognizes that our courts have already held that neither the habitual felon statute nor the habitual misdemeanor assault statute violate the Double Jeopardy Clause. *See State v. Todd*, 313 N.C. 110, 117, 326 S.E.2d 249, 253 (1985) (upholding habitual felon statute); *State v. Carpenter*, 155 N.C. App. 35, 47-48, 573 S.E.2d 668, 676-77 (2002) (addressing habitual misdemeanor assault), *disc. review denied*, 356 N.C. 681, 577 S.E.2d 896 (2003). Nevertheless, he urges that we reconsider this precedent in light of *Apprendi* and *Blakely*.

Defendant's novel interpretation of *Apprendi* and *Blakely* was, however, recently rejected by this Court in *Massey*. In addressing precisely the arguments made in this case, this Court held:

Although defendant contends that the *Apprendi* line of cases renders habitual misdemeanor assault unconstitutional as violative of the prohibition against double jeopardy, defendant reads too much into *Apprendi* and its progeny. *Blakely* explicitly permits sentence enhancements provided that sentence enhancements, with the exception of prior convictions, are found beyond a reasonable doubt by the jury. In fact, the United States Supreme Court expressly permitted sentence enhancements imposed by a judge when the defendant stipulates to the relevant facts or consents to judicial fact-finding. . . . In essence, *Apprendi* and *Blakely* applied the Sixth Amendment right to a jury trial to sentence enhancements. Defendant's argument, however, is directed at the *Fifth* Amendment prohibition against double jeopardy, and accordingly, *Apprendi* and *Blakely* are inapposite.

We decline to extend the Supreme Court's holdings in *Apprendi* and *Blakely* to the habitual misdemeanor assault statute, and as we are bound by prior decisions of a panel of this Court, defendant's argument is precluded by *State v. Carpenter*, 155 N.C. App. 35, 573 S.E.2d 668 [(2002)].

Massey, 179 N.C. App. at 808, 635 S.E.2d at 531-32 (internal citations omitted).

Although *Massey* addressed only the habitual misdemeanor assault statute, its analysis—rejecting defendant's contention that

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Apprendi and *Blakely* have transformed recidivist offenses from sentence-enhancing statuses into solely substantive criminal offenses—is equally controlling as to defendant's arguments in this case regarding the habitual felon statute. We continue, therefore, to be bound by *Todd*. Since defendant has offered no other basis for reversal, we hold that defendant received a trial free of error.

No error.

Judges LEVINSON and JACKSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 FEBRUARY 2007

BENSON v. BENSON No. 06-266	Davidson (05CVD2425)	Reversed
BRASWELL v. ST. PAUL MERCURY INS. CO. No. 06-157	Wayne (04CVS1363)	Reversed and remanded
BRISTOW DEV. CO. v. CRAVER ESTATES, INC. No. 06-893	Davidson (06CVS62)	Dismissed
CEBALLOS v. INTREPID USA No. 06-414	Indus. Comm. (I.C. #291468)	Affirmed
DEANS v. TERRY No. 06-488	Mecklenburg (01CVD15895)	Affirmed
DEPARTMENT OF TRANSP. v. PRINCE No. 06-104	Lee (00CVS1079)	Affirmed
EMERGING DISPLAY TECHS. CORP. v. UNICOMP, INC. No. 06-27	Wake (04CVS11629)	Affirmed
GERSCH v. FANTASIA No. 06-741	Wake (06CVD1121)	Affirmed
GREEN v. BRANCH BANKING & TR. No. 05-1681	Lee (04CVS562)	Affirmed
HARDEE v. LOWE'S COS. No. 06-795	Catawba (05CVS308)	Dismissed
IN RE A.D.C. No. 06-804	Union (05J21)	Affirmed
IN RE A.Q., D.Q., L.Q., J.D. No. 06-365	Lee (04J24-27)	Affirmed
IN RE C.E.R., A.M.R., J.E.I., & S.N.I. No. 06-972	Catawba (04J112-16)	Affirmed
IN RE C.J., M.C., A.C. No. 06-1300	Rowan (06JA43-45)	Affirmed
IN RE C.P.A. No. 06-1220	Burke (06J38)	Affirmed
IN RE C.P.H. & C.L.H. No. 06-977	Surry (04J116-17)	Reversed and remanded

IN RE D.L.B., T.L.B., K.L.B. No. 06-493	Cabarrus (04J18-20)	Affirmed
IN RE D.O.A. No. 06-1400	Henderson (06J89)	Affirmed
IN RE E.M.V. No. 06-486	Harnett (05J128)	Affirmed in part, re- versed in part and remanded
IN RE F.M.A. No. 06-935	Surry (06J08)	Affirmed
IN RE J.D. No. 06-1050	Wake (04J233)	Affirmed
IN RE J.J., T-a.J., T-e.J. No. 06-1299	Mecklenburg (06JT67-69)	Affirmed
IN RE J.L.P. No. 06-642	Gates (05J17)	Affirmed
IN RE J.S. & C.S. No. 06-551	Henderson (02J103-04)	Affirmed
IN RE J.S.H. No. 06-713	Buncombe (04J268)	Affirmed
IN RE K.D.R. No. 06-1206	Catawba (99J338)	Dismissed in part; Affirmed in part
IN RE K.F., R.J.W., M.W., M.W., C.W. No. 06-906	Sampson (05J01-05)	Dismissed
IN RE K.J. No. 06-936	Guilford (04J764)	Affirmed
IN RE K.S. & J.S. No. 06-777	Beaufort (03J68-69)	Affirmed
IN RE L.A.P. No. 06-244	Surry (02J35A)	Affirmed
IN RE L.S. No. 06-733	Durham (02J93)	Affirmed
IN RE M.D.B. No. 06-1025	Caldwell (04J130)	Affirmed
IN RE M.E.P.V., A.V.V., S.V.P., V.G.P., & J.D.G.P. No. 06-1024	Johnston (06JA54-58)	Affirmed
IN RE M.M., D.L. No. 06-1053	Harnett (05J155) (05J156)	Affirmed

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IN RE N.S. No. 06-831	Lee (05J66)	Affirmed
IN RE R.W. & C.W. No. 06-706	Wilkes (98J56-57)	Affirmed
IN RE T.G.K., III No. 06-638	Davie (05J71)	Affirmed
IN RE T.M.W. No. 06-1158	Wake (05J723)	Affirmed
IN RE V.T. & A.T. No. 06-355	Mecklenburg (04JT1213-14)	Affirmed
LEE CTY. DEPT' OF SOC. SERVS. v. BARBEE No. 06-800	Lee (05CVD1035)	Reversed and remanded
MAYO v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 06-382	Indus. Comm. (I.C. #TA-17544)	Affirmed
McDANIEL v. CONTINENTAL TIRE No. 06-448	Indus. Comm. (I.C. #398514)	Reversed and remanded
MITCHELL v. MITCHELL No. 06-147	Wilkes (02CVD16)	Reversed and remanded
MOORE v. COVENANT TRANSP., INC. No. 06-226	Indus. Comm. (I.C. #383755)	Affirmed
STATE v. ALBRITTAIN No. 06-640	Wayne (05CRS51688-90) (05CRS51694) (05CRS51709) (05CRS51833)	Reversed and remanded
STATE v. ANDERSON No. 06-570	Lincoln (04CRS50515)	No error
STATE v. BINGMAN No. 06-872	Wake (05CRS1490-92)	No error in defendant's trial; remanded for a new restitution award
STATE v. BOOTH No. 06-712	Wayne (04CRS61172)	Affirmed
STATE v. BROWN No. 06-891	Stokes (03CRS1379) (03CRS50233-34) (03CRS50276) (03CRS50284)	Dismissed

STATE v. CALDWELL No. 05-1646	Forsyth (96CRS9888)	Affirmed
STATE v. CHASTAINE No. 06-799	Gaston (01CRS67023) (01CRS67029-35) (02CRS4721-22) (02CRS4737-38)	Dismissed
STATE v. DAVIS No. 06-654	Forsyth (02CRS61720)	Reversed
STATE v. DENNIS No. 06-840	Craven (05CRS52657-58)	No error
STATE v. FELTS No. 06-843	Buncombe (03CRS57355) (03CRS61831) (05CRS55966)	Appeal dismissed
STATE v. GILLIAM No. 06-951	Henderson (05CRS58566-70) (05CRS58585)	Dismissed
STATE v. HARDY No. 06-64	Pitt (04CRS56466-68)	No error
STATE v. HOLDER No. 06-1103	Johnston (02CRS6247) (02CRS54284)	No error
STATE v. HOLT No. 06-826	Alamance (04CRS50200) (04CRS51442)	Affirmed
STATE v. JAMES No. 06-845	Pender (05CRS50509) (05CRS51037) (05CRS3269)	No error
STATE v. LAKEY No. 06-602	Cumberland (04CRS62180)	No error
STATE v. LEE No. 06-988	Wake (05CRS27812)	No error
STATE v. PORTIS No. 06-709	Cumberland (04CRS69839)	No error
STATE v. ROBINSON No. 06-824	Guilford (04CRS72391-92)	No error
STATE v. SAAFIR No. 06-909	Durham (98CRS12136)	Judgment arrested
STATE v. SANDERS No. 06-783	Harnett (05CRS57099)	No error

STATE v. SHOE No. 06-774	Randolph (03CRS54434)	Reversed and remanded
STATE v. SILCOX No. 06-772	Rowan (03CRS51198)	No error
STATE v. SIZEMORE No. 06-823	Henderson (05CRS2240-51)	No error
STATE v. SMART No. 06-180	Forsyth (04CRS58213) (04CRS35976)	No error
STATE v. TERRY No. 06-393	Vance (05CRS50457-58)	No error
STATE v. TRUJILLO No. 06-2	Montgomery (04CRS50701-02) (04CRS50847)	Affirmed
STATE v. WALKER No. 06-641	Columbus (04CRS54631)	No error
STATE v. WINCHESTER No. 06-643	Mecklenburg (04CRS251205-08)	No error
VEGA v. SANDERS FORD, INC. No. 06-291	Martin (03CVS417)	No error
WHITAKER v. WHITAKER No. 06-465	Forsyth (02CVS1327)	Affirmed

PROGRESS ENERGY CAROLINAS, INC. v. STRICKLAND

[181 N.C. App. 610 (2007)]

PROGRESS ENERGY CAROLINAS, INC., PETITIONER V.
WILLIAM HOWELL STRICKLAND, RESPONDENT

No. COA06-20

(Filed 20 February 2007)

1. Appeal and Error— appealability—condemnation—decision on area—remand for appointment of commissioners—substantial right—appealable

A condemnation order is immediately appealable if it decides questions of title or area taken. The order here, which allowed condemnation but remanded the matter to the clerk for further proceedings, decided questions of area taken.

2. Eminent Domain— private condemnation—utility line—burden of proof on respondent

Respondent bore the burden of proving that the court should not grant a petition by an electric utility to condemn an easement for a power line. Petitioner is a private condemnor as described in N.C.G.S. § 40A-3(a); private condemnation proceedings are governed by Article 2 of Chapter 40A. N.C.G.S. § 40A-25.

3. Eminent Domain— private utility—garden not affected

The trial court did not err by finding that a reasonable size garden was not affected by the easement that petitioner wished to condemn, based on respondent's burden of proof and his equivocal evidence about the size, location, and boundaries of the garden, even though the phrase "reasonable size" does not appear in N.C.G.S. § 40A-3(a). Because of this finding, that statute, which prohibits private condemnation of gardens, does not apply.

4. Eminent Domain— private utility—extent of easement—adequately described

A petition for condemnation by an electric utility sufficiently described the extent of the easement to be condemned and whether petitioner had the authority to condemn.

5. Eminent Domain— private utility—airstrip affected statutes read together

Petitioner, a private electric utility, had the authority to condemn property that affected airstrips. Statutes giving electric power companies the power of condemnation and those prohibiting airport hazards are in conflict; the most harmonious reading is that the "obstruction" and "hazard" language in the avi-

PROGRESS ENERGY CAROLINAS, INC. v. STRICKLAND

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ation statutes do not pertain to airport rights and uses that become permanently condemned through a formal condemnation proceeding and for which just compensation is received.

Judge TYSON concurring in part and dissenting in part.

Appeal by respondent from judgment entered 15 August 2005 by Judge William C. Gore, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 13 November 2006.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., John C. Cooke, and Elizabeth T. Smith, and The Yarborough Law Firm, by Garris Neil Yarborough, for petitioner-appellee.

Vandeventer Black LLP, by David P. Ferrell, for respondent-appellant.

MARTIN, Chief Judge.

Petitioner sought to condemn an easement across respondent's property as part of a plan to build a 230 kilovolt power line across Columbus County, North Carolina, running from a point of delivery southeast of Chadbourn, North Carolina, to Nichols, South Carolina. After a hearing before the North Carolina Utilities Commission, petitioner received a certificate of environmental compatibility and public convenience and necessity. Subsequently, petitioner filed a petition for condemnation and appointment of commissioners with the Columbus County Clerk of Superior Court on 2 February 2005. Petitioner alleged, *inter alia*, that it has the right of eminent domain, that acquisition of an easement over respondent's property is necessary and in the public interest, and that the easement needs to allow petitioner to construct, operate, and maintain electric and communication facilities. Respondent answered the petition alleging that the proposed easement would condemn his burial ground, usual dwelling house and yard, kitchen, and garden in contravention of the eminent domain statutes. Respondent further alleged that the easement would obstruct and interfere with two airstrips located on his property.

On 7 June 2005, the matter was transferred to the Superior Court Division. After a hearing on 5 July 2005, the court granted the petition and made the following findings: no one is buried within the proposed easement area and the easement to be taken does not affect any burial ground as the property existed on 2 February 2005, the easement to be taken does not affect the kitchen and reasonable size garden of

PROGRESS ENERGY CAROLINAS, INC. v. STRICKLAND

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the respondent as the property existed on 2 February 2005, and the easement to be taken will affect in some way one or both of respondent's two airstrips. The court concluded that petitioner has the right to condemn the property and remanded the matter to the Clerk of Superior Court for the appointment of commissioners and for further proceedings through the normal condemnation process, which would include valuation of the rights being condemned.

Respondent filed a notice of appeal and made fifty-two assignments of error relating to three legal issues: whether petitioner has the authority to condemn by eminent domain any portion of respondent's garden for the purpose of erecting an electric transmission line, whether petitioner sufficiently described the easement to be condemned and has the legal right to condemn the rights described in the petition, and whether petitioner can exercise the power of eminent domain in light of North Carolina law prohibiting the obstruction of private airports and runways. In its reply brief, petitioner argues that the respondent's appeal is interlocutory and must be dismissed.

I. Right to Appellate Review

[1] We first consider whether respondent's appeal in this case is an interlocutory appeal requiring dismissal. "A ruling is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Dep't of Transp. v. Rowe*, 351 N.C. 172, 174, 521 S.E.2d 707, 708 (1999) (quoting *Greene v. Charlotte Chem. Lab., Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)), *rev'd on other grounds*, 353 N.C. 671, 549 S.E.2d 203 (2001). In the present case, the Superior Court determined the issue of whether to grant petitioner the right to condemn the easement but remanded the matter to the Clerk of Superior Court for the appointment of commissioners and for further condemnation proceedings; thus, the appeal is interlocutory.

"There is generally no right to appeal an interlocutory order." *Gregory v. Penland*, 179 N.C. App. 505, 509, 634 S.E.2d 625, 628 (2006). However, "a party may appeal an interlocutory order that 'affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.' " *Rowe*, 351 N.C. at 175, 521 S.E.2d at 709 (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). The Supreme Court recognized in *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967) that "orders from a con-

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demise hearing concerning title and area taken are ‘vital preliminary issues’ that must be immediately appealed pursuant to N.C.G.S. § 1-277, which permits interlocutory appeals of determinations affecting substantial rights.” *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709; *see also Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784; *N.C. Dep’t of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005).

The Supreme Court defined the concept of vital preliminary issues in two eminent domain cases, *Nuckles* and *Rowe*. The issue before the Court in *Nuckles* was which tracts the State Highway Commission was taking by eminent domain. When considering whether this was a vital preliminary issue, the Court noted:

Obviously, it would be an exercise in futility . . . to have the jury assess damages to tracts 1, 2, 3, and 4 if plaintiff were condemning only tracts A and B, and the verdict would be set aside on appeal for errors committed by the judge in determining the “issues other than damages.”

Nuckles, 271 N.C. at 14, 155 S.E.2d at 784. By contrast, in *Rowe* the landowners appealed the issue of the unification of four of their tracts through condemnation. The Court noted: “Defendants contest only the unification of the four remaining tracts, not what parcel of land is being taken or to whom that land belongs. Thus, we hold that the trial court’s interlocutory order does not affect any substantial right of these defendants.” *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709. The Court went on to limit the *Nuckles* holding to “questions of title and area taken.” *Id.*

Applying this vital preliminary issue analysis to the case before us, the order is immediately appealable if it decided questions of title or area taken. The order in this case decided whether petitioner had the right to condemn the area of land described in the proposed easement, considering the proximity of respondent’s garden and airstrips to the affected land. These are questions of area taken. Here, as in *Nuckles*, it would be futile for a jury to assess damages to respondent when the easement taken could be set aside because it unlawfully takes a garden or obstructs an airport. Since the order decided vital preliminary issues concerning the area to be condemned, the interlocutory order is appealable pursuant to N.C.G.S. § 1-277.

II. Respondent’s First Issue: The Garden

[2] We next consider whether the court erred in finding that respondent’s reasonable size garden was not affected by the easement and

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whether the law allows petitioner to condemn the proposed easement for an electric transmission line. The court found: “The easement to be taken by condemnation over Respondent’s property does not affect the kitchen and reasonable size garden of the Respondent as said property existed on the date the Petition was filed, February 2, 2005.” Respondent argues that the evidence does not support the court’s finding and that the finding does not support the court’s conclusion that “Petitioner has the right to condemn the property in the manner noted in the Findings of Fact.” As a preliminary matter, we note that, in this particular case, respondent bore the burden of proving that the court should not grant the petition, according to N.C.G.S. § 40A-25. Section 40A-25 applies to eminent domain proceedings by *private* condemners, and it states:

On presenting such petition to the clerk of superior court, . . . all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same. The clerk shall hear the proofs and allegations of the parties, and *if no sufficient cause is shown against granting the prayer* of the petition, shall make an order for the appointment of three commissioners

N.C. Gen. Stat. § 40A-25 (2005) (emphasis added). Petitioner Progress Energy Carolinas, Inc. is a private condemner as described in N.C.G.S. § 40A-3(a), which includes corporations, bodies politic, or persons whose purpose is to construct power lines and other facilities related to power generation and distribution. N.C. Gen. Stat. § 40A-3(a)(1) (2005).

The statutory authority found in § 40A-25 is distinguishable from cases cited by both respondent and the dissent in support of their assertion that petitioner bears the burden of proof. *See Redev. Comm’n of Washington v. Grimes*, 277 N.C. 634, 643-44, 178 S.E.2d 345, 350-51 (1971); *City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970). Both *Grimes* and *McNeely* involved public condemners, who are not governed by § 40A-25. *See* N.C. Gen. Stat. § 40A-3(b)-(c) (2005) (defining public condemners); N.C. Gen. Stat. § 40A-19 (2005) (limiting the application of § 40A-25 to “[a]ny private condemnor enumerated in G.S. 40A-3(a)”). Furthermore, both *Grimes* and *McNeely* cite to Chapter 40 of our General Statutes, which was repealed in 1981. 1981 N.C. Sess. Laws ch. 919, § 1. Public condemnation proceedings are governed by what is now Article 3 of Chapter 40A, while private condemnation proceedings are governed by Article 2 of Chapter 40A.

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[3] Having established the proper burden of proof, we consider the merit of respondent's arguments. "The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 408 (2004). The evidence presented at the hearing was inconclusive as to the precise location of respondent's garden in relation to the proposed easement. Respondent testified about the location of his garden by describing a large rectangle with indefinite boundaries that appeared on an aerial photograph. It is apparent from the transcript that respondent offered testimony by pointing to areas of the photograph, although the gestures are not recorded in the transcript. Respondent testified orally that the garden extended from the current right of way to the house; however, respondent also testified that he did not know exactly where the proposed easement would run in relation to his garden. Considering the equivocal competent evidence about the size, location, and boundaries of the garden, and respondent's burden to show that the garden did fall within the proposed easement, the court did not err in finding that a reasonable size garden was not affected by the easement. As supported by the competent evidence, this fact is binding on appeal.

Respondent argues the court erred in concluding, based on this finding, that petitioner had the right to condemn respondent's garden in contravention of the plain language of N.C.G.S. § 40A-3(a), governing private condemners, which states: "No such condemner shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute." N.C. Gen. Stat. § 40A-3(a) (2005). Although this statute in fact limits a private condemner's power to condemn a garden, the court's conclusion in the present case does not contravene the statute. The trial court did not find that the proposed easement would affect the respondent's garden, which finding would have triggered the § 40A-3 limitation. Rather, the court concluded that petitioner has the right to condemn based on the finding that a reasonable size garden would not be affected.

Respondent further argues the court used the wrong standard when it made a finding with regard to a "reasonable size garden" because such language does not appear in the statute. We acknowledge that N.C.G.S. § 40A-3 does not use the standard of a "reasonable size garden," but in the present case this is not a fatal flaw. If the

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court's findings support the conclusions of law, we will affirm the trial court's order. *See Resort Realty*, 163 N.C. App. at 116, 593 S.E.2d at 408. Here, the court found that a reasonable size garden would not be affected by the proposed easement. The finding suggests either that the whole garden, of a reasonable size, was not affected by the proposed easement or at least that the respondent did not meet his burden of proving that any portion of the garden was affected by the easement. Either reading of the finding is sufficient to support the court's conclusion that the petitioner has the right to condemn the land.

III. Respondent's Second Issue: Description of the Easement

[4] The second issue raised by respondent is whether the petition sufficiently described the extent of the easement to be condemned and whether petitioner has the legal authority to condemn the rights described in the petition. N.C.G.S. § 40A-20 governs what information must be alleged in the petition. It requires "a description of the property which the condemnor seeks to acquire . . . , stating in detail the nature of its public business, and the specific use of the property; and that the property described in the petition is required for the purpose of conducting the proposed business." N.C. Gen. Stat. § 40A-20 (2005). We conclude that petitioner satisfied the statutory requirements where the petition (1) included a legal description of the property and the easement area in exhibit A, (2) described its intended use as "Petitioner plans to construct across land owned by Respondent a transmission and/or distribution line consisting of one or more wires attached to poles for the purpose of transmitting and distributing electric power as part of the necessary functioning of Petitioner's electric system," and (3) further described in paragraph 8, for one and one-half pages, the nature of the right, title, and interest that it sought to condemn.

Citing *Cannon v. City of Wilmington*, 242 N.C. 711, 89 S.E.2d 595 (1955), cert. denied, 352 U.S. 842, 1 L. Ed. 2d 58 (1956), both respondent and the dissent assert that petitioner is required to define with particularity the location and extent of its claimed easement. *Id.* at 714, 89 S.E.2d at 597. We note that *Cannon*, a case about a public taking by the State Highway and Public Works Commission, was decided in 1955, under a previous version of the eminent domain statutes. *See id.* at 713, 89 S.E.2d at 597. Our General Assembly repealed the eminent domain laws appearing in Chapter 40 of our General Statutes in 1981 and enacted Chapter 40A. 1981 N.C. Sess. Laws ch. 919, § 1. To the extent that *Cannon* might constitute controlling precedent in the

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case of a private condemnation proceeding, we rely on our General Assembly to have incorporated it into the recodified eminent domain statutes, and § 40A-20 in particular.

Similarly, we recognize that *M.E. Gruber, Inc. v. Eubank*, 197 N.C. 280, 148 S.E. 246 (1929), cited by the dissent, is not controlling precedent in this case because it pertains specifically to easements created by deed, not to eminent domain proceedings. *Id.* at 284, 148 S.E. at 248 (“An easement, of course, is an interest in land, and *if it is created by deed*, either by express grant or by reservation, the description thereof must not be too uncertain, vague and indefinite.”) (emphasis added).

Respondent also cites N.C.G.S. § 40A-66 as statutory authority requiring certain descriptions to appear in the petition; however, § 40A-66 governs valuation and does not impose requirements on the petition. We do not read such requirements into the statute because “[w]hen [a] section dealing with a specific matter is clear and understandable on its face, it requires no construction.” *State ex rel. Utils. Comm’n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). We conclude the description of the easement sought to be condemned in the petition is sufficient.

Respondent further argues that petitioner does not have the authority to condemn an easement to construct “future facilities.” As we have previously discussed, under N.C.G.S. § 40A-25, we must determine whether respondent has successfully shown that petitioner has exceeded its authority in seeking condemnation of the easement for future facilities. As all of the facilities to be built on a proposed easement are “future” facilities, petitioner’s authority to condemn the easement for future facilities is granted in the statutory grant of eminent domain appearing in N.C.G.S. § 62-183, which includes the right to erect poles and towers and to establish offices and powerhouses. N.C. Gen. Stat. § 62-183 (2005). We have found no other authority suggesting that “future facilities” are excluded from the general grant; therefore, the description in the petition does not exceed petitioner’s authority to condemn under our statutes. Furthermore, to the extent that petitioner shall have the right to construct future facilities, respondent may seek compensation for his loss at the valuation stage.

IV. Respondent’s Third Issue: The Airstrips

[5] We turn to the final issue in this appeal, whether petitioner can exercise the power of eminent domain when it conflicts with statutes

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governing the obstruction of private airports and runways. The alleged conflict between the statutes stems from language in N.C.G.S. § 62-183 that electric power companies may condemn by eminent domain a “right-of-way over the lands, privileges and easements of other persons and corporations” and language in the aviation statutes which declares that airport hazards are not in the public interest and obstruction of a private airport is a misdemeanor. N.C. Gen. Stat. §§ 63-30, 63-37.1 (2005). In this case, the court found that “[t]he easement to be taken by condemnation over Respondent’s property will affect in some way one or both of the two (2) airstrips of the Respondent.” Since respondent did not assign error to this finding of fact, it is presumed to be correct and supported by the evidence. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). Respondent argues that the proposed easement in this case would create both an obstruction and a hazard to respondent’s airstrips and that the aviation statutes therefore prohibit petitioner from condemning the easement.

We first note the principle of statutory construction that “[i]nterpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible.” *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 593, 551 S.E.2d 873, 876 (2001). The statutory construction advocated by respondent results in a conflict between the statutes, namely that the eminent domain statute allows condemnation of the easement near the airstrip while the aviation statutes prohibit it. The precedent for statutory construction requires that we consider whether the statutes can be read in such a way as to avoid conflict. This can be accomplished by an understanding of the language “obstruction” and “hazard” in the aviation statutes as not pertaining to airport rights and uses that become permanently condemned through a formal condemnation proceeding and for which just compensation is received. We find this to be the most harmonious reading of the two statutes because, to the extent the power lines in the easement will affect the airstrips, they constitute a condemnation of certain activity on the airstrip, rather than a hazard or obstruction. The loss of use or other effect of the easement on the airstrip may be resolved in the valuation portion of the proceedings.

Even if the statutes could not be read together to avoid conflict, any resolution of the conflict between the statutes, based on the other principles of statutory construction, would result in the eminent domain statutes controlling the present situation. We note that “the

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exclusion of a particular circumstance from a statute's general operation is evidence of legislative intent not to exempt other particular circumstances not expressly excluded." *Dep't of Transp. v. Humphries*, 347 N.C. 649, 656, 496 S.E.2d 563, 567 (1998) (quoting *Batten v. N.C. Dep't of Corrections*, 326 N.C. 338, 344-45, 389 S.E.2d 35, 39 (1990)). Eminent domain statute N.C.G.S. § 40A-3(a) contains specific exemptions from the general ability of private condemners to condemn property where it prohibits condemnation of burial grounds, houses and yards, and kitchens and gardens without the owner's consent unless authorized by statute. Since N.C.G.S. § 40A-3 contains exceptions which do not include land that affects a private airstrip, this is evidence that the legislature did not intend to exempt such land. Furthermore, "[w]hen a more generally applicable statute conflicts with a more specific, special statute, the 'special statute is viewed as an exception to the provisions of the general statute'" *Taylor v. Robinson*, 131 N.C. App. 337, 338, 508 S.E.2d 289, 291 (1998) (quoting *Domestic Electric Service, Inc. v. City of Rocky Mount*, 20 N.C. App. 347, 350, 201 S.E.2d 508, 510 (1974)). As the eminent domain statutes contain much more detail about what land may be taken for what uses, as discussed above, the aviation statutes are the generally applicable statutes and the eminent domain statutes are an exception to it.

Finally, we note that the court was required to grant the petition unless respondent successfully showed cause that condemnation of the easement is prohibited by law. Accordingly, we conclude that the North Carolina statutes grant petitioner the authority to condemn respondent's land even though it "will affect in some way one or both of the two (2) airstrips," and we affirm.

Affirmed.

Judge CALABRIA concurs.

Judge TYSON concurs in part and dissents in part by separate opinion.

TYSON, Judge, concurring in part, dissenting in part.

I concur with the majority's opinion that respondent's interlocutory appeal is properly before us. I do not agree with the remainder of the majority's opinion on the merits of respondent's appeal. Affirming the trial court is error because: (1) N.C. Gen. Stat. § 40A-3(a) exempts

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and specifically prohibits petitioner from condemning respondent's kitchen and garden without the owner's consent; (2) the trial court improperly imposed a "reasonable size" standard not present in N.C. Gen. Stat. § 40A-3(a); (3) petitioner's petition does not sufficiently describe the proposed easement as required by N.C. Gen. Stat. § 40A-20 and seeks to exercise unbridled discretion over future expansions, uses, and burdens of the easement; and (4) petitioner's proposed condemnation of an easement expressly violates N.C. Gen. Stat. § 63-30 and N.C. Gen. Stat. § 63-37.1. I vote to reverse the trial court's order and respectfully dissent.

I. Standard of Review

Our Supreme Court has stated:

It is well settled that the power of eminent domain is inherent in sovereignty. *The Legislature has the right to determine what portion of this sovereign power it will delegate to public or private corporations to be used for public benefit.* The right of eminent domain must be conferred by statute, expressly or by necessary implication, and such statute must be strictly construed.

Colonial Pipeline Co. v. Neill, 296 N.C. 503, 504, 251 S.E.2d 457, 459 (1979) (internal citations omitted) (emphasis supplied).

II. Respondent's Kitchen and Garden

Respondent argues the trial court erred in interpreting and applying N.C. Gen. Stat. § 40A-3(a) to allow petitioner's condemnation of his kitchen and garden. I agree.

N.C. Gen. Stat. § 40A-3(a) (2005) states, "*No such condemnor shall be allowed* to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, *kitchen and garden*, unless condemnation of such property is expressly authorized by statute." (Emphasis supplied).

Our Supreme Court has stated:

The limitation contained in G.S. 40-10 [the immediate predecessor of N.C. Gen. Stat. § 40A-3(a)] as enacted by the General Assembly of 1852, chapter 92, section 1, which was an act to define the duties and powers of turnpike and plank road companies. It was codified in the Revised Code of 1855, chapter 61, section 21, and read as follows: "No such corporation shall be allowed to have condemned to its use, without the consent of the

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owner, his dwelling house, yard, kitchen, garden or burial ground." This exact language was carried forward in section 1701, chapter 38, in the Code of 1883. The provision later became a part of section 2578 of the Revisal of 1905, chapter 61.

Mount Olive v. Cowan, 235 N.C. 259, 260, 69 S.E.2d 525, 526 (1952). Our Supreme Court has specifically recognized the limitation contained in Section 2578 of the Revisal of 1905, Chapter 61, a direct predecessor to N.C. Gen. Stat. § 40A-3(a), applies to petitioner as a private condemnor. *R. R. Manufacturing Co. v. Mecklenburg Mfg. Co.*, 166 N.C. 168, 180-81, 82 S.E. 5, 10 (1914). The prohibitions contained in the statutes have remained virtually unchanged for 155 years and have been continuously re-codified by our General Assembly in each revisal of the North Carolina General Statutes. *Mount Olive*, 235 N.C. at 260, 69 S.E.2d at 526.

A. Burden of Proof

The petitioner bears the burden of: (1) proving a legal right to condemn the property described in the petition; (2) establishing the legal sufficiency of the petition; and (3) showing affirmative compliance with all applicable statutory provisions. *See Redevelopment Comm. v. Grimes*, 277 N.C. 634, 643, 178 S.E.2d 345, 350 (1971) (The petitioner "must exercise the power of eminent domain pursuant to Chapter 160 and Chapter 40, and in order to invoke the power of eminent domain petitioner must affirmatively allege or prove compliance with the statutory requirements."); *City of Charlotte v. McNeely*, 8 N.C. App. 649, 653, 175 S.E.2d 348, 351 (1970) ("[W]hen the City undertook to exercise the power of eminent domain which had been granted to it by the Legislature, it was necessary that it both allege and prove compliance with statutory procedural requirements."). The General Assembly's limited delegation of eminent domain to petitioner, as a private condemnation authority, is expressly limited by Articles One and Two of N.C. Gen. Stat. § 40A.

Petitioner carries the burden to prove the proposed condemnation of an easement does not violate N.C. Gen. Stat. § 40A-3(a). *Id.* The trial court and the majority's opinion erroneously shifts the burden onto respondent to prove petitioner's purported easement actually condemns respondent's kitchen or garden. The majority's opinion relies on N.C. Gen. Stat. § 40A-25 to assert "respondent bore the burden of proving that the court should not grant the petition[.]" I disagree.

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“It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, [over] other sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). “When, . . . [a] section dealing with a specific matter is clear and understandable on its face, it requires no construction.” *Id.*

N.C. Gen. Stat. § 40A-25 is a statute of general applicability that applies, as the majority states, “to eminent domain proceedings by private condemners.” N.C. Gen. Stat. § 40A-3(a) is a specific prohibition exempting from private condemnation an owner’s “burial ground, usual dwelling house and yard, kitchen and garden” without the condemnor proving either “the consent of the owner” or that the condemnation is “expressly authorized by statute.” This statute clearly and unambiguously places the burden on petitioner to either show “consent of the owner” or that the condemnation is “expressly authorized by statute.” N.C. Gen. Stat. § 40A-3(a). This specific statute trumps the general provisions of N.C. Gen. Stat. § 40A-25. *Utilities Comm.*, 275 N.C. at 260, 166 S.E.2d at 670.

B. N.C. Gen. Stat. § 62-183 and § 62-184 (2005)

In the absence of the owner’s consent, petitioner argues its power to condemn respondent’s kitchen and garden “is expressly authorized by statute” based upon N.C. Gen. Stat. §§ 62-183 and 62-184. N.C. Gen. Stat. § 40A-3(a). I disagree.

N.C. Gen. Stat. § 62-183 is a legislative delegation of a portion of the state’s eminent domain powers to private condemners, to include public utilities. N.C. Gen. Stat. § 62-183. The powers granted to petitioner in N.C. Gen. Stat. § 62-183 are expressly limited by the provisions of N.C. Gen. Stat. § 62-184 which expressly restate the prohibitions contained in N.C. Gen. Stat. § 40A-3(a):

The dwelling house, yard, kitchen, garden or burial ground of the owner may be taken under G.S. 62-183 *when the company alleges, and* upon the proceedings to condemn *makes it appear* to the satisfaction of the court, that it owns or otherwise controls not less than seventy-five percent (75%) of the fall of the river or stream on which it proposes to erect its works, from the location of its proposed dam to the head of its pond or reservoir; *or when the Commission, upon the petition filed by the company, shall, after due inquiry, so authorize.*

N.C. Gen. Stat. § 62-184 (emphasis supplied).

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Here, petitioner does not propose to erect any “works” on a “river or stream.” The State Utilities Commission (“the Commission”) did not “so authorize” petitioner’s taking of respondent’s kitchen and garden. *Id.* The record clearly shows the Commission specifically avoided ruling on this issue and concluded, “The remaining issues regarding the valuation of land and the presence of burial grounds, gardens, and kitchens are issues which need not be resolved in the current certification proceeding *but are left to be resolved*, if necessary, *in the final acquisition of right-of-way for the new transmission line.*” (Emphasis supplied). Petitioner’s asserted power to take respondent’s kitchen and garden is: (1) without respondent’s consent; (2) not authorized by North Carolina statutes; and (3) not “so authorized” by the Commission. *Id.*

N.C. Gen. Stat. § 40A-3(a) is an express reservation by the General Assembly from its delegation under the police power of eminent domain to private condemors to take private property unless the property is acquired with the owner’s consent or through the authority granted in another statute. N.C. Gen. Stat. § 40A-3(a). The General Assembly’s prohibitions contained in N.C. Gen. Stat. § 40A-3(a) are expressly recited in N.C. Gen. Stat. § 62-184. The uses and classes of private property exempt from being taken are recited verbatim. N.C. Gen. Stat. § 62-184.

The exempt properties are those regarded as worthy of the highest protections from interference by others and are so closely related to a person’s shelter, food, maintenance, and the sacred grounds containing the remains of family members. These prohibitions have been maintained and continued virtually unchanged for over 155 years, for more than one half of the time of North Carolina’s existence as a state. When the statutes are read together, the identical exemptions and prohibitions show the General Assembly’s clear intent to prohibit a private condemnor from taking another owner’s specified private property unless the condemning entity proves the consent of the owner or strict compliance with the requirements contained in both N.C. Gen. Stat. § 40A-3(a) and N.C. Gen. Stat. § 62-184.

C. Condemnation of Respondent’s Kitchen and Garden

The issue is whether petitioner’s proposed easement condemns portions of respondent’s kitchen and garden. Petitioner argues the proposed easement does not condemn a portion of respondent’s garden. I disagree.

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Here, petitioner expressly carries the burden to prove the proposed easement does not condemn respondent's kitchen or garden. *See Redevelopment Comm.*, 277 N.C. at 643, 178 S.E.2d at 350 (Petitioner "must exercise the power of eminent domain pursuant to Chapter 160 and Chapter 40 and in order to invoke the power of eminent domain *petitioner must affirmatively allege or prove* compliance with the statutory requirements." (emphasis supplied)); *City of Charlotte*, 8 N.C. App. at 653, 175 S.E.2d at 351 ("[W]hen the City undertook to exercise the power of eminent domain which had been granted to it by the Legislature, it was necessary that it both *allege and prove* compliance with statutory procedural requirements." (emphasis supplied)).

Respondent's uncontradicted testimony showed the land petitioner seeks to condemn has been owned by respondent's family for over a hundred years and consists of his home place, kitchen, garden, burial ground, and yard. Respondent did not consent to petitioner's taking. Respondent identified the parameters of the garden his family had established and used for many years and testified petitioner's proposed condemnation would take portions of the garden. Respondent testified the petitioner's surveying stake was placed in the middle of the garden. Petitioner failed to present any evidence whatsoever to rebut respondent's testimony and other evidence admitted. Petitioner failed to meet its burden to prove the proposed easement does not condemn respondent's garden and does not violate N.C. Gen. Stat. § 40A-3(a). The trial court erred by failing to rule petitioner's condemnation violated N.C. Gen. Stat. § 40A-3(a).

The trial court also erred in interpreting and applying N.C. Gen. Stat. § 40A-3(a). The trial court's finding of fact numbered 23 states: "The easement to be taken by condemnation over Respondent's property does not affect the kitchen and reasonable size garden of the Respondent as said property existed on the date the Petition was filed, February 2, 2005." The trial court hand wrote the words "reasonable size" into the remaining typed portions of finding of fact 23. The trial court improperly imposed a quantification and a reasonableness standard onto the size or extent of respondent's garden that does not appear in N.C. Gen. Stat. § 40A-3(a).

As noted, N.C. Gen. Stat. § 40A-3(a) states in relevant part:

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual

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dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

Our Supreme Court has stated “it is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 314, 526 S.E.2d 167, 170 (2000) (internal quotations and citations omitted). The right of eminent domain “must be strictly construed.” *Colonial Pipeline Co.*, 296 N.C. at 504, 251 S.E.2d at 459.

N.C. Gen. Stat. § 40A-3(a) is clear and unambiguous and does not contain a “reasonable size” standard to allow the trial court to limit, ignore or fail to enforce the express terms of the statute. Under N.C. Gen. Stat. § 40A-3(a), our General Assembly has strictly protected, for 155 years, a landowners “burial ground, usual dwelling house and yard, kitchen and garden.” N.C. Gen. Stat. § 40A-3(a). Allowing the trial court to judicially impose a “reasonable size” standard on respondent’s kitchen and garden would allow a court to impose a “reasonable size” standard on respondent’s home and burial grounds that is not allowed by the statute. The trial court erred as a matter of law by judicially re-drafting the statute and imposing a “reasonable size” limitation that does not appear in N.C. Gen. Stat. § 40A-3(a). *Union Carbide Corp.*, 351 N.C. at 314, 526 S.E.2d at 170; *Colonial Pipeline Co.*, 296 N.C. at 504, 251 S.E.2d at 459.

III. Description of the Proposed Easement

Respondent argues petitioner’s petition does not sufficiently describe the easement to be condemned and failed to define with particularity the rights petitioner purports to take. I agree.

N.C. Gen. Stat. § 40A-20 (2005) states the information that must be stated in a petition for condemnation and requires, in relevant part:

The petition shall be signed and verified. If filed by the condemnor, *it must contain a description of the property which the condemnor seeks to acquire*; and it must state that the condemnor is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, *stating in detail the nature of its public business, and the specific use of the property[.]*

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(Emphasis supplied). Petitioner was required to define with particularity: (1) the location and description of any claimed easement; and, (2) the “specific use[s]”, burdens, and extent of any claimed easement. *Id.*; *Cannon v. City of Wilmington*, 242 N.C. 711, 714, 89 S.E.2d 595, 597 (1955), *cert. denied*, 352 U.S. 842, 1 L. Ed. 2d 58 (1956). “An easement, of course, is an interest in land, and, . . . the description thereof must not be too uncertain, vague and indefinite.” *Gruber v. Eubank*, 197 N.C. 280, 284, 148 S.E. 246, 248 (1929). The purpose, burdens, and allowed uses of an easement must “be set forth precisely.” Patrick K. Hetrick & James B. McLaughlin, Jr., Webster’s Real Estate Law in North Carolina § 15-9 (5th ed. 1999).

Petitioner also bears the burden of establishing the legal sufficiency of the petition. See *Redevelopment Comm.*, 277 N.C. at 643, 178 S.E.2d at 350; *City of Charlotte*, 8 N.C. App. at 653, 175 S.E.2d at 351. While the petition provides a legal description of the easement area to be taken, it fails to describe with particularity the specific uses, burdens, and extent of the easement, attempts to provide petitioner with unbridled discretion over future additional uses and burdens and structures within the easement, and purports to muzzle respondent’s objections or assertion of his underlying property rights. *Cannon*, 242 N.C. at 714, 89 S.E.2d at 597.

The petition failed to describe the number or location of power lines and poles to be constructed across respondent’s property lines, the height of power lines, and the voltage of the lines, or other improvements to be located on the easement. The proposed easement states, “Petitioner reserves the right to construct future facilities within said easement area and *Respondent shall not interfere with or object to the construction of said future facilities.*” Without the statutorily required specificity, petitioners’ purported “easement” is actually a taking of all of respondent’s rights, title, and interest in the property described in the petition under the guise of an easement. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441, 73 L. Ed. 2d 868, 886 (1982) (“[A] permanent physical occupation of property is a [*per se*] taking.”).

Petitioner’s failed to allege with particularity the extent of the specific uses, burdens, and improvements it seeks to take within the claimed easement in their petition. *Cannon*, 242 N.C. at 714, 89 S.E.2d at 597; N.C. Gen. Stat. § 40A-20. Petitioner’s also failed to meet their burden of establishing the legal sufficiency of the petition. See *Redevelopment Comm.*, 277 N.C. at 643, 178 S.E.2d at 350; *City of*

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Charlotte, 8 N.C. App. at 653, 175 S.E.2d at 351. The trial court erred by not dismissing petitioner's petition.

IV. Respondent's Airport

Respondent also argues petitioner cannot exercise the power of eminent domain in contravention of North Carolina law prohibiting the obstruction of respondent's private airport and runways. Respondent contends that the petition must also be dismissed because the proposed easement creates an obstruction and hazard to respondent's pre-existing and established airstrips in violation of N.C. Gen. Stat. §§ 63-30 and 63-37.1 (2005). I agree.

N.C. Gen. Stat. § 63-30 states:

It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare.

N.C. Gen. Stat. § 63-37.1 states:

Any person, other than the owner or operator of an airport, who intentionally obstructs the lawful takeoff and landing operations and patterns of aircraft at an existing public or private airport shall be guilty of a Class 1 misdemeanor.

An airport is defined in N.C. Gen. Stat. § 63-1 (2005) as:

(8) "Airport" means any area of land or water, except a restricted landing area, which is designed for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights-of-way, whether heretofore or hereafter established.

Uncontradicted testimony established respondent's airstrips and related facilities constitute an airport under N.C. Gen. Stat. § 63-1. The trial court found as fact that "The easement to be taken by condemnation over Respondent's property will affect in some way one or both of the two (2) airstrips of the Respondent." Based upon this

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unchallenged finding of fact, the trial court erred by failing to conclude as a matter of law that petitioner's petition violated N.C. Gen. Stat. §§ 63-30 and 63-37.1. No finding of fact supports the trial court's conclusion of law to allow the condemnation to lawfully proceed.

As noted above, petitioner bears the burden of showing affirmative compliance with all applicable statutory provisions. *See Redevelopment Comm.*, 277 N.C. at 643, 178 S.E.2d at 350; *City of Charlotte*, 8 N.C. App. at 653, 175 S.E.2d at 351. N.C. Gen. Stat. § 63-30 and § 63-37.1 statutorily control this petition. Petitioner failed to meet its burden of showing affirmative compliance with these statutes.

The term "person" is defined in N.C. Gen. Stat. § 63-37.1 as "any individual, firm, partnership, *corporation*, *company*, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof." N.C. Gen. Stat. 63-1(a)(17) (emphasis supplied). N.C. Gen. Stat. § 63-37.1 is a criminal statute of general applicability, and applies to all "persons", including petitioner in its purported exercise of their power of eminent domain. Petitioner failed to offer any evidence or argument that it or other private condemnors are specifically exempted from the statutory prohibitions of N.C. Gen. Stat. § 63-30 and § 63-37.1.

Petitioner failed to offer any evidence to prove its petition complied with applicable statutory provisions, N.C. Gen. Stat. §§ 63-30 and 63-37.1. The trial court's unchallenged finding of fact shows the proposed taking "will affect in some way one or both of the two (2) airstrips of the Respondent." The trial court's findings of fact do not support its conclusion of law, and compels a contrary conclusion. The trial court erred by not dismissing the petition.

V. Conclusion

The majority's conclusion to affirm the trial court is error because: (1) N.C. Gen. Stat. § 40A-3(a) (2005) prohibits petitioner from condemning respondent's kitchen and garden without the owner's consent; (2) the trial court judicially re-drafted N.C. Gen. Stat. § 40A-3(a) and unlawfully imposed a "reasonable size" standard on respondent's garden that does not appear and is not allowed by the clear and unambiguous language of the statute; (3) petitioner's petition does not specifically describe the uses, burdens, and extent of the proposed easement as required by N.C. Gen. Stat. § 40A-20 and seeks to enlarge, in petitioner's unbridled discretion, the uses, burdens, and structures petitioner may impose on respond-

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ent in the future; and (4) petitioner's proposed imposition of an easement on respondent's airport violates N.C. Gen. Stat. § 63-30 and § 63-37.1. These errors of law, singularly or collectively, compels dismissal of petitioner's petition. I vote to reverse the trial court's order and remand with instructions to dismiss the petition. I respectfully dissent.

SCOTT P. SOBCZAK, PLAINTIFF v. MATTHEW G. VORHOLT, DEFENDANT

No. COA05-1298

(Filed 20 February 2007)

1. Motor Vehicles— accident on snowy road—crossing center line—intent irrelevant—instruction on statutory violation

The trial court erred in a case involving a traffic accident on a snowy road by refusing to give plaintiff's requested instruction that defendant violated N.C.G.S. § 20-146(d) by failing to keep his vehicle in his lane of travel. It is irrelevant that defendant did not intentionally drive across the center line; there was evidence from which a jury could find that defendant was negligent before he lost control.

2. Motor Vehicles— accident on snowy road—sudden emergency instruction—erroneously given—awareness of risk

The trial court erred by giving a sudden emergency instruction in a case arising from a traffic accident on a snowy road. Because defendant knew or should have known that the snow could become ice in some areas, the mere fact that he did not see the icy patch in advance of hitting it is insufficient to establish that he was confronted with a sudden emergency.

Appeal by Plaintiff from judgment entered 7 February 2005 by Judge W. Osmond Smith, III, in Durham County Superior Court. Heard in the Court of Appeals 12 April 2006.

Thomas, Ferguson & Mullins, L.L.P., by Jay H. Ferguson, for Plaintiff-Appellant.

Law Offices of Douglas F. DeBank, by Douglas F. DeBank, for Defendant-Appellee.

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STEPHENSONS, Judge.

Plaintiff appeals from a judgment of the trial court which dismissed his lawsuit with prejudice after a jury found in favor of Defendant. In support of his appeal, Plaintiff brings forward two assignments of error relating to the trial judge's instructions to the jury. For the reasons stated herein, we reverse and remand for a new trial.

At trial during the 31 January 2005 session of Civil Superior Court of Durham County, the evidence tended to show that on 9 January 2001, Plaintiff left his home in Pittsboro about 7:00 a.m. en route to his job as an automotive mechanic in Chapel Hill. He traveled the same direction as usual which took him northbound on Jones Ferry Road. The sun was not quite up yet, but Plaintiff could see without lights. It had snowed the previous evening, and there was a light dusting of snow on the ground and the roadway. As Plaintiff proceeded north, he saw Defendant approaching in the southbound lane of travel. Jones Ferry Road in that area is a two-lane, narrow "country road[.]" Looking north, the road is "a straight shot." The speed limit is fifty-five miles per hour, but due to the snowy conditions, Plaintiff was driving thirty to thirty-five miles per hour. He testified that he felt his speed was a "safe, manageable speed . . . given the conditions[.]" and was a speed that would enable him to keep control of his vehicle, a 1994 Toyota truck.

When Plaintiff was about twenty to twenty-five feet away from Defendant, he saw Defendant's front passenger wheel going off the surface of the road. Plaintiff slowed down and eased his vehicle further toward the right shoulder. He then observed Defendant's wheels turning to get back on the road. Within fifteen to twenty feet of Plaintiff, Defendant's car, a 1996 Ford Escort, "shot" across the road and struck Plaintiff's truck, causing it to turn over on its side. The point of impact was primarily the front quarter panel of Plaintiff's truck and "head on, . . . right up the center" of Defendant's car. The collision occurred in Plaintiff's lane of travel.

Plaintiff's wife, Norma Sobczak, also drove on Jones Ferry Road that morning on her way to work. She testified that there was a light dusting of snow on the ground, but she "felt comfortable enough" driving. She said the sun had not yet come up, but it was nevertheless light enough to see and she "could still see a little bit of the snow[]" on the road. Mrs. Sobczak traveled to the scene of her husband's accident, where she observed Defendant's car in the middle of the road and Plaintiff's truck on the side of the road.

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Timothy Horne, an investigator with the Orange County Sheriff's Department, arrived on the scene just after the accident occurred. He came onto Jones Ferry Road headed southbound, traveling in the same direction as Defendant. Deputy Horne testified that the sun was not "totally up[,]" but it was "light enough" that he could see. Even though there was a light dusting of snow on the roadway, he could make out the center line and shoulder. He also observed tracks in the snow where cars had been traveling through it and noted that the snow was deeper in some areas than others. He said he could distinguish between the car tracks and the surrounding area, and that he had no trouble seeing the areas that were snowy and icy as he drove to the accident scene.

At the scene, Deputy Horne, who is related to Plaintiff by marriage, saw Plaintiff's truck flipped onto the passenger side in the northbound lane of travel and Defendant's car in the southbound lane, close to the center line. Plaintiff told Deputy Horne that a car had crossed into his lane and struck his truck.

Deputy Horne then identified the other driver as Defendant. According to Deputy Horne, Defendant told him that he was on his way to work and as he was going around a corner, "he must have been going a little too fast and he slid over and hit [Plaintiff][.]"

Bobby Price of the North Carolina Highway Patrol received a call at 7:18 a.m. for emergency assistance at the accident scene. He testified it was still dawn at that time, but the sun was "breaking over the horizon real good[]" and he could see without lights. Officer Price traveled to the scene in the same direction as Defendant had driven. He testified that there was "a lot of ice and black ice on Jones Ferry Road[,]" explaining that there would be clear stretches and then shaded areas that were "pretty consistent with ice." The road conditions required him to drive slowly. When he arrived on the scene, Plaintiff had already been taken to the emergency room. He interviewed Defendant about what had happened and had Defendant prepare a written statement, which said: "I was heading southbound coming out of a turn. My car got on the ice patches and was caused to start fishtailing. . . . I could not gain control and crossed the line and hit an oncoming vehicle."

Officer Price prepared a diagram of the accident scene and, during his investigation, determined that the collision occurred in the northbound lane. Defendant told Officer Price that he was traveling approximately thirty to thirty-five miles per hour before the accident.

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Officer Price issued a citation to Defendant for exceeding a safe speed while driving on ice.

Greg Tilley, a first responder on the scene, testified that “we were in a bad weather, severe weather, response. . . . And upon dispatch, they let us know that the roads were bad and we need[ed] to proceed with caution.” He described the roadway as an “icy, snowy condition.” Even though it was early morning, the light conditions were “[g]ood[,]” and he had no problem seeing as he drove to the scene. He stated that “you could definitely see patches of different things on the road the whole way over,” and the conditions were “very obvious.” Mr. Tilley said that Defendant made “a comment . . . to the effect that, . . . maybe speed had something to do with the accident, because of the road conditions.”

Mary Stoffregen, an elementary school teacher, testified that she was following Plaintiff’s truck when Defendant struck it. She described the road conditions as “slippery” and testified that, as she drove, she was wondering why school had not been delayed. She stated further that she “was not feeling safe driving to school on the roads.”

Defendant testified that he left home at 6:40 a.m. to get to his job site early to turn on the heaters, which was one of his responsibilities. Defendant was not due at work until 8:00 a.m., but he ordinarily arrived between 7:20 and 7:30 a.m. His commute usually took him thirty-five to forty minutes. He had been working at this particular job site for about seven months and always took the same route to work. On this morning, Defendant observed a dusting of snow on his car and left early due to the weather conditions. He was driving in third gear with his headlights on and his windshield wipers operating, and was going approximately thirty to thirty-five miles per hour with both hands on the steering wheel. Defendant described the road on which he was traveling as “twist[ing] and turn[ing].” He noticed the dusting of snow on Jones Ferry Road and testified that “it was hard to somewhat make out[.]” He described Jones Ferry Road as a “very narrow road, [with] very little room for error, even on a good day.”

Defendant estimated that he traveled approximately four miles on Jones Ferry Road before the accident occurred and said that, during those four miles, he did not encounter any slipping, sliding, or spinning of his wheels and did not “com[e] anywhere close to losing control” of his vehicle. When asked whether there was any black or hidden ice, or ice he could not see, Defendant responded, “[N]othing

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that I could really make out, other than you could see, . . . where the snow was, and, of course, with the tire tracks through there, knowing . . . it had possibly been compacted down into ice."

As Defendant came out of a bend into the straightaway, he saw a car "quit[e] a distance" in front of him slide "just a little bit" and apply its brakes. He estimated that the car was thirty to forty yards ahead of him. Defendant then "immediately thought, okay, there's ice coming." Defendant testified that he put his clutch in and approached the ice. He said that putting the clutch in "pulled power away from the vehicle[,]" but he did not know if the car slowed down. When he hit the ice, his car slid and he did not feel like he had any control over his vehicle. Defendant tried to regain control of his wheels by steering off the road onto the right shoulder. However, when his car hit the shoulder, it "bounced," came back onto the road, and crashed into Plaintiff's vehicle. Defendant testified that it was his intent to get off the road and stop his vehicle. He testified further that he did not see the ice before he hit it, and he had not seen any ice patches on Jones Ferry Road during his entire drive that morning before the accident.

Defendant denied telling Deputy Horne that he must have been going too fast. He told Officer Price that he did not want to miss work to attend his court date for the citation he received. Officer Price explained that Defendant could pay his ticket off or attend his court date. Defendant testified that he elected to pay the ticket off because he "couldn't afford to miss work." He did not intend to admit fault or responsibility by doing so. He believed that if he paid the ticket off, "it was gone." At trial, Defendant denied responsibility for the accident.

Plaintiff was taken by ambulance to UNC Hospital where he was admitted for treatment of a compression fracture of his spine. He incurred total medical expenses of \$13,208.65 and was out of work for four months.

On 3 February 2005, after instructions, the trial judge sent the case to the jury. The negligence instruction given by the judge, in pertinent part, was as follows:

[T]he plaintiff must prove by the greater weight of the evidence that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's injuries.

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary

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care to protect himself and others from injury. . . . [O]rdinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury. A person's failure to use ordinary care is negligence.

Every person is also under a duty to follow standards of conduct enacted as laws for the safety of the public. A standard of conduct established by safety statute must be followed. A person's failure to do so is negligence in and of itself.

A person who, through no negligence of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others, whether actual or apparent, is not required to use the same judgment that would be required if there were more time to make a decision. The person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances.

If, in a moment of sudden emergency, a person makes a decision that a reasonably prudent person would make under the same or similar circumstances, he does all that the law requires, even if in hindsight some different decision would have been better or safer.

If, in a moment of such sudden emergency, an operator uses that degree of care which a reasonably prudent person would use under the same or similar circumstance, he would not be negligent even though he may have violated a standard of conduct established by safety statute. In other words, an operator's conduct which might otherwise be negligent in and of itself would not be negligent if it results from a sudden emergency that is not of the operator's own making.

The judge also charged the jury on Plaintiff's specific contentions of negligence, that (1) Defendant failed to use ordinary care by failing to keep a reasonable lookout, (2) Defendant failed to use ordinary care by failing to keep his vehicle under proper control, and (3) Defendant violated a safety statute by operating his vehicle at a speed greater than was reasonable and prudent under the conditions then existing. He included the following:

When the conditions existing at the scene, such as ice, and/or snow, on the roadway, increase the danger by comparison to that

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existing under normal conditions, the care required of the operator is correspondingly increased. . . .

The mere skidding of a vehicle does not by itself imply negligence. However, you may consider skidding as some evidence of negligence when the vehicle skids because[] (a) the vehicle is operated at a speed in excess of that speed that would be reasonable and prudent for the existing conditions; and/or, (b)[] there is ice and/or snow on the roadway. Such evidence may be considered together with all of the other evidence in determining whether the operator failed to drive at a speed and in a manner which allowed the operator to maintain that degree of control over the vehicle which a reasonably careful and prudent person would have maintained under the same or similar circumstances.

. . . .

In determining whether the vehicle was being operated at a speed greater than was reasonable and prudent . . . , you should consider all of the evidence about the physical features at the scene[:] the time of day, the weather conditions, the extent of other traffic, the width and nature of the roadway, and any other circumstances shown to exist.

Later that same day, the jury returned a verdict in favor of Defendant, answering “No” to the issue of whether Plaintiff was injured by the negligence of Defendant. Plaintiff timely appealed.

On appeal, Plaintiff challenges the trial court’s jury instructions in two respects: first, he argues that the court erred in refusing to instruct that Defendant violated N.C. Gen. Stat. § 20-146(d) by failing to keep his vehicle in his lane of travel, and that such violation constitutes negligence *per se*; second, he contends that the court erred by giving a sudden emergency instruction. For the following reasons, we agree and thus hold that Plaintiff is entitled to a new trial.

[1] “‘When a party’s requested jury instruction is correct and supported by the evidence, the trial court is required to give the instruction.’” *Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) (quoting *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 464, 553 S.E.2d 431, 441 (2001), *disc. review denied*, 356 N.C. 315, 571 S.E.2d 220 (2002)). For an appeal on the trial court’s failure to give a requested instruction to prevail, a party must establish the following elements: (1) the requested instruction was a correct statement of law; (2) the

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requested instruction was supported by the evidence; (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested; and (4) such failure likely misled the jury. *Liborio v. King*, 150 N.C. App. 531, 564 S.E.2d 272, *disc. review denied*, 356 N.C. 304, 570 S.E.2d 726 (2002). “The instructions must be based on evidence, which when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted.” *Anderson v. Austin*, 115 N.C. App. 134, 136, 443 S.E.2d 737, 739 (citations omitted), *disc. review denied*, 338 N.C. 514, 452 S.E.2d 806 (1994). “When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error.” *Maglione*, 168 N.C. App. at 56, 607 S.E.2d at 291 (quoting *Faeber v. E.C.T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972)). The trial court need not give the exact instruction as requested, and failure to give the requested instruction is not error so long as “the substance of the requested instruction” is given. *Parker v. Barefoot*, 130 N.C. App. 18, 20, 502 S.E.2d 42, 44, *disc. review denied*, 349 N.C. 362, 525 S.E.2d 455 (1998), *rev’d on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999).

In this case, the trial judge denied Plaintiff’s request that he give an instruction on the lane violation as negligence *per se*. The trial court reasoned that the instruction would not be proper because Defendant did not intentionally drive his car into Plaintiff’s lane; instead, he skidded out of control into the left lane. On appeal, Defendant argues that the trial court was correct because all of the evidence presented in the case establishes that Defendant did not “drive” his car across the center line into Plaintiff’s lane of travel. We disagree.

Section 20-146 of the North Carolina General Statutes provides in pertinent part that:

(d) Whenever any street has been divided into two or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply.

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

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N.C. Gen. Stat. § 20-146(d)(1) (2001). Plaintiff is correct that a violation of this statute constitutes negligence *per se* and that, if negligence resulting from such violation proximately causes injury, “liability results.” *Stephens v. Southern Oil Co.*, 259 N.C. 456, 458, 131 S.E.2d 39, 41 (1963). See also *Anderson v. Webb*, 267 N.C. 745, 749, 148 S.E.2d 846, 849 (1966) (“When a plaintiff suing to recover damages for injuries sustained in a collision offers evidence tending to show that the collision occurred when the defendant was driving to his left of the center of the highway, such evidence makes out a *prima facie* case of actionable negligence”).

Here, Plaintiff established a *prima facie* case of negligence in that all of the evidence showed that Defendant crossed over the center line and struck Plaintiff in the opposing lane of traffic. The requested instruction regarding violation of section 20-146(d) was therefore a correct statement of the law supported by the evidence, and the trial court erred in refusing to give such instruction. It is irrelevant that Defendant did not *intentionally* drive his car from his lane of travel across the center line. Rather, the crucial inquiry is whether Defendant’s actions culminating in the accident were *negligent*. On this question, there was evidence from which a jury could find that Defendant was negligent in the operation of his vehicle *before* he lost control, and that these negligent acts in fact caused him to lose control of the vehicle. For example, there was evidence from which the jury could find that Defendant was on notice that icy conditions prevailed on the road. In addition, there was evidence from which the jury could find that Defendant was traveling at an unsafe speed for the road conditions at the time. Thus, a reasonable juror could find that Defendant drove his car in a negligent manner in his own lane of travel, culminating in a loss of control of the vehicle which, in turn, caused him to cross the center line and collide with Plaintiff’s car.

“However, a defendant may escape liability by showing that he was on the wrong side of the road from a cause other than his own negligence.” *Anderson*, 267 N.C. at 749, 148 S.E.2d at 849. Thus, Defendant could rebut the presumption of negligence created by a violation of section 20-146(d) by presenting evidence that he was on the wrong side of the road from a cause other than his own negligence. See *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 258 S.E.2d 334 (1979). Defendant was also free to request an additional jury instruction informing the jury that if it found that Defendant’s violation of section 20-146(d) was not caused by his negligence, the

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presumption of negligence was rebutted. *See* N.C.P.I. Civ. 204.09, n.3 (motor veh. vol. 1998).

Moreover, while we believe the negligence charge given by the trial judge was very thorough, we are not persuaded by Defendant's further argument that the court's charge to the jury, "[i]n its totality, . . . fairly represented all of the material issues." Although the judge instructed the jury that every person is under a duty to follow standards of conduct established by a safety statute and that a person's failure to do so is negligence in and of itself, the only specific safety statute on which he then charged the jury was N.C. Gen. Stat. § 20-141 (a), that "[n]o person shall drive a vehicle on a highway . . . at a speed greater than is reasonable and prudent under the conditions then existing." The jury was thus limited to finding negligence on the basis of Defendant's violation of a safety statute if it found that he was driving his vehicle at a speed greater than was reasonable and prudent at the time. This charge did not permit the jury to consider, alternatively, that Defendant was negligent because of actions that caused his vehicle to cross the center line and collide with Plaintiff's car in Plaintiff's lane of travel. Because there was evidence to support an instruction on a violation of section 20-146(d), the trial court erred in denying Plaintiff's request that such instruction be given.

[2] Plaintiff next assigns error to the trial court's instruction to the jury on the doctrine of sudden emergency, arguing that the evidence was insufficient to support this instruction. We agree.

"The sudden emergency doctrine provides that one confronted with an emergency is not liable for an injury resulting from his acting as a reasonable man might act in such an emergency." *Campbell v. McIlwain*, 163 N.C. App. 553, 556, 593 S.E.2d 799, 802 (2004). Two elements must be satisfied before the sudden emergency doctrine applies: (1) an emergency situation must exist requiring immediate action to avoid injury, and (2) the emergency must not have been created by the negligence of the party seeking the protection of the doctrine. *Allen v. Efird*, 123 N.C. App. 701, 474 S.E.2d 141 (1996), *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997).

As for the first element of the sudden emergency doctrine, "[a]n 'emergency situation' has been defined by our courts as that which 'compels [defendant] to act instantly to avoid a collision or injury[.]'" *Reed v. Abrahamson*, 108 N.C. App. 301, 308, 423 S.E.2d 491, 495 (1992) (quoting *Schaefer v. Wickstead*, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988)), *cert. denied*, 333 N.C. 463, 427 S.E.2d 624

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(1993). The second element prohibits application of this doctrine “where the sudden emergency was caused, at least in part, by defendant’s negligence in failing to maintain the proper lookout or speed in light of the roadway conditions at the time.” *Allen*, 123 N.C. App. at 703, 474 S.E.2d at 143. Moreover, “[a] sudden emergency instruction is improper absent evidence of a sudden *and unforeseeable* change in conditions to which the driver must respond to avoid injury.” *Id.* (emphasis added).

In this case, Defendant argues that he was entitled to the sudden emergency instruction because (1) he had not encountered any slipping or sliding of his wheels during the four miles he drove on Jones Ferry Road before the accident occurred, (2) he had not encountered or observed any ice, hidden or obvious, in that distance, (3) he had not lost control of his car before the accident, (4) the “nature and character of the roadway conditions changed abruptly immediately” in the area where the accident occurred, and (5) he slid on ice that he had not observed before hitting it “almost immediately” upon seeing a vehicle in front of him slide. We are not persuaded by Defendant’s argument.

All of the emergency and law enforcement witnesses described the existence of icy patches in some areas of southbound Jones Ferry Road in the four miles traveled by Defendant before the accident occurred. Although Defendant denied that he observed or otherwise became aware of those icy areas, he conceded that (1) he saw the snow on the roadway; (2) he observed tracks of cars that had traveled through the snow before he came along; (3) he knew from his previous driving experience that “when snow gets traveled on[,] it packs down[] [and] when it gets packed down, it can turn to ice[;];” and (4) he acknowledged that he knew as he drove on the morning of 9 January 2001 that the snowy areas he saw with tire tracks through them “had possibly been compacted down into ice.” These admissions of Defendant establish that he was on notice of a potential encounter with ice on the road, and that hitting ice as he drove was foreseeable. For this reason, the evidence does not sustain Defendant’s contention that he was confronted with a sudden and unforeseeable change in road conditions, and that he was thereby called upon to respond to a sudden emergency.

This Court’s decision in *Banks v. McGee*, 124 N.C. App. 32, 475 S.E.2d 733 (1996), is particularly persuasive here. In *Banks*, the defendant lost control of her car after hitting a puddle of water. When she hit the water, her car started hydroplaning and skidded into the

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other lane, colliding with the plaintiffs' car. Defendant testified she was aware that it was raining, the roads were slick, and water tended to puddle in places on the road she was traveling. She claimed that she was entitled to a jury instruction on sudden emergency, however, because she did not see the puddle before she hit it and, thus, she was confronted with an unanticipated and sudden situation. The trial court agreed and gave a sudden emergency instruction. The jury answered the negligence issue in the defendant's favor.

On appeal, this Court framed the issue thusly: “[W]hether the defendant is entitled to a sudden emergency instruction when she loses control of her automobile on a rainy day after striking a puddle of water on a road when she is aware that water tends to puddle on that road.” *Id.* at 33-34, 475 S.E.2d at 734. Noting that the evidence of the defendant's knowledge of the road conditions was undisputed, this Court held that such evidence “simply cannot support a conclusion that the defendant's contact with the puddle of water was an unanticipated event. . . . *The question is not what she saw but instead what a reasonable person in her situation should have seen.*” *Id.* (emphasis added). See also *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984) (“The crucial question in determining the applicability of the sudden emergency doctrine is . . . whether [defendant], when approaching the stopped vehicle, saw or by the exercise of due care should have seen that he was approaching a zone of danger.”) (emphasis added).

Because Defendant in the case *sub judice* knew or in the exercise of reasonable care should have known that the snow on Jones Ferry Road could have become ice in some areas, the mere fact that he did not see the icy patch he hit in advance of hitting it is insufficient to establish that he was thereby confronted with a sudden emergency. The trial court thus erred in instructing the jury on sudden emergency.

We agree with Defendant, however, that Plaintiff is entitled to a new trial only if the trial court's error in giving a sudden emergency instruction was prejudicial, that is, that it probably influenced the jury's verdict. See N.C. Gen. Stat. § 1A-1, Rule 61 (2005); See *Word v. Jones ex rel. Moore*, 350 N.C. 557, 565, 516 S.E.2d 144, 148 (1999) (“erroneous jury instructions are not grounds for granting a new trial unless the error affected a substantial right.”). The instructions of the trial judge in this case made it clear that, in considering whether Defendant failed to keep a proper lookout, failed to keep his vehicle

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under proper control, or drove too fast for conditions, the jury should take the icy and snowy conditions into account. In fact, the charge plainly permitted the jury to find that the skidding of Defendant's car was evidence of negligence solely because there was ice or snow on the roadway. Preceding these instructions, however, was the court's sudden emergency instruction which allowed the jury to conclude that even if Defendant was negligent in the operation of his car up to the point that he hit the ice, he was not liable for the accident because the ice that caused him to lose control of his car constituted sudden and unforeseeable conditions. Under these circumstances, we are unable to say as a matter of law that the jury was not influenced in its decision by the court's sudden emergency instruction. Plaintiff, therefore, is entitled to a new trial. *Accord, Pinckney v. Baker*, 130 N.C. App. 670, 674, 504 S.E.2d 99, 102 (1998) ("[w]hen a trial judge instructs the jury on an issue not raised by the evidence, a new trial is required") (quoting *Giles v. Smith*, 112 N.C. App. 508, 512, 435 S.E.2d 832, 834 (1993)).

NEW TRIAL.

Judges MCGEE and HUNTER concur.

CHRISTIAN EMERSON DYSART AND MILDRED MAXWELL DYSART, PLAINTIFFS v.
WILLIAM KENT CUMMINGS AND KIMBERLY N. CUMMINGS, DEFENDANTS

No. COA06-645

(Filed 20 February 2007)

Vendor and Purchaser— contract to purchase home—cost of repair contingency—termination of contract—return of earnest money

The trial court did not err in a breach of contract case by entering summary judgment allowing plaintiff purchasers to recover the \$10,500 earnest money deposit they gave to defendant sellers after plaintiffs terminated the contract to purchase a home based upon structural defects where a cost of repair contingency addendum to the purchase contract permitted plaintiffs to terminate the contract and reclaim their earnest money "if a reasonable estimate of the cost of repairs" discovered pursuant to inspections permitted by the contract "exceeds \$1,000," and

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plaintiffs acted in a reasonable manner and in good faith and fair play when, within the 14-day time period for inspections stated in the contract, they arranged inspections of the home, received reports that the home had structural defects that would cost more than \$10,000 to repair, and gave notice to defendants that they were exercising their option under the cost of repair contingency addendum to terminate the contract.

Judge STROUD dissenting.

Appeal by defendants from order entered 1 March 2006 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 10 January 2007.

Boyce & Isley, PLLC, by Philip R. Isley, for plaintiffs-appellees.

Bass, Bryant & Fanney, P.L.L.C., by John Walter Bryant and Eva C. Currin, for defendants-appellants.

TYSON, Judge.

William Kent Cummings and wife, Kimberly N. Cummings, (“defendants”) appeal from order entered granting Christian Emerson Dysart and wife, Mildred Maxwell Dysart’s (“plaintiffs”) motion for summary judgment. We affirm.

I. Background

On 26 August 2003, plaintiffs offered to purchase defendants’ home located at 2512 White Oak Road in Raleigh, North Carolina, pursuant to an Offer to Purchase and Contract (the “Contract”). The Contract recited a purchase price of \$1,200,500.00 and an earnest money deposit of \$10,500.00. The deposit was tendered by plaintiffs with the Contract and received by defendants and held in escrow. Defendants signed the Contract that day. The Contract included an attached document, titled “ADDITIONAL PROVISIONS ADDENDUM” (the “Cost of Repair Contingency”), which was signed simultaneously. The Addendum states:

9. COST OF REPAIR CONTINGENCY: If a reasonable estimate of the total cost of repairs required by Paragraph 12(b) and Paragraph 12(c) of the Offer to Purchase and Contract equals or exceeds \$10,000.00, then Buyer shall have the option to terminate this Contract and all earnest monies shall be returned to Buyer.

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IN THE EVENT OF A CONFLICT BETWEEN THIS ADDENDUM AND THE OFFER TO PURCHASE AND CONTRACT, THIS ADDENDUM SHALL CONTROL.

Paragraph 12(b) and Paragraph 12(c) of the contract state:

12. (b) Property Inspections: Unless otherwise stated herein, Buyer shall have the option of inspecting, or obtaining at Buyers expense inspections, to determine the condition of the Property. Unless otherwise stated herein, it is a condition of this contract that (i) the built-in appliances, electrical system, plumbing system, heating and cooling systems, roof coverings (including flashing and gutters), doors and windows, exterior surfaces, structural components (including foundations, columns, chimneys, floors, walls, ceilings, and roofs), porches and decks, fireplaces and hues, crawl space and attic ventilation systems (if any), water and sewer systems (public and private), shall be performing the function for which intended and shall not be in need of immediate repair; (ii) there shall be no unusual drainage conditions or evidence of excessive moisture adversely affecting the structure(s) and (iii) there shall be no friable asbestos or existing environmental contamination. Any inspections shall be completed and written notice of necessary repairs shall be given to Seller on or before 14 days after acceptance. Seller shall provide written notice to Buyer of Seller's response within 5 days of Buyer's notice. Buyer is advised to have any inspections made prior to incurring expenses for Closing and in sufficient time to permit any required repairs to be completed by Closing.

[12.] (c) Wood-Destroying Insects: Unless otherwise stated herein, Buyer shall have the option of obtaining, at Buyer's expense, a report from a licensed pest control operator on a standard form in accordance with the regulations of the North Carolina Structural Pest Control Committee, stating that as to all structures except N/A, there was no visible evidence of wood-destroying insects and containing no indication of visible damage therefrom. The report must be obtained in sufficient time so as to permit treatment, if any, and repairs, if any, to be completed prior to Closing. All treatment required shall be paid for by Seller and completed prior to Closing, unless otherwise agreed upon in writing by the parties. The Buyer is advised that the inspection report described in this paragraph may not always reveal either structural damage or damage caused by agents or organisms other

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than wood-destroying insects. If new construction, Seller shall provide a standard warranty of termite soil treatment.

The Contract also stated, “[i]n the event: (1) this offer is not accepted; or (2) any of the conditions hereto are not satisfied, then all earnest monies shall be returned to Buyer . . .”

On 8 September 2003, Philip W. McLean, Sr. (“McLean”), a licensed North Carolina home inspector, conducted a home inspection for plaintiffs. McLean’s inspection reported a “[s]ignificant settlement crack at the left front corner. (the crack appears to start at the bottom and run up through and to the 2nd floor). (b) A crack in the stucco (left rear of garage wall). Further evaluation is warranted.” McLean’s affidavit stated his “report was made available to Plaintiffs on September 9, 2003.”

Also on 8 September 2003, Mitchell Fluhrer (“Fluhrer”), a structural engineer, inspected the house. His evaluation noted structural defects to the house. Fluhrer stated in his affidavit that “in [his] professional opinion [he] would expect that this repair would well exceed more than \$10,000.” Fluhrer provided two separate letters dated 10 September 2003 and 11 September 2003 to plaintiff Christian Dysart that stated his findings.

Plaintiff Mildred Maxwell Dysart stated in her deposition that “[I]ater in the day of September 9, 2003, we instructed our realtor to terminate the contract pursuant to paragraph 9 of the Additional Provisions Addendum to the Offer to Purchase and Contract . . . Our realtor faxed a notice of termination of the contract to the seller’s realtor that same day.”

On 9 September 2003, defendants’ real estate agent, Mary Edna Williams (“Williams”), received a facsimile by telecopy from plaintiffs’ real estate agent, Bill Sewell (“Sewell”). This facsimile stated “Buyer had decided to terminate contract per additional provisions addendum #9.” The facsimile included the North Carolina Association of Realtors standard form “Termination of Contract and Release of Earnest Money” signed by plaintiffs on 9 September 2003 and a copy of the signed Additional Provisions Addendum.

On 10 or 11 September 2003, Steve Schmidt, a superintendent for McDonald-York, Inc., a commercial construction company located in Raleigh, North Carolina, evaluated the house. At that time, he had in his possession a letter written by Fluhrer and McLean’s inspection report. During his inspection, he determined that “the left front cor-

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ner of this house is leaning to the left 2.175 inches . . . at the top [sic] of the wall. As viewed by the left side this corner is leaning 0.365 inches to the right. This is indicative of a foundation failure at this corner." Schmidt prepared a written estimate of the total cost of repair for \$58,910.23.

On 11 or 12 September 2003, plaintiffs hand delivered and Williams, defendants' broker, received a letter that delineated the reasons for termination and demanded return of the \$10,500.00 earnest money held in escrow. Williams stated in her deposition that "[o]n or after September 9, 2003, I received a home inspection report by Philip McLean, two reports from Fluhrer Reed with dates of September 10 and 11, 2003 and an estimate from MY Homes dated September 12, 2003, which documents were also faxed to Kent Cummings." Williams stated, "[t]he house was taken off the market when the Offer to Purchase and Agreement was signed by the Dysarts and Cummings. The house was put back on the market on September 9, 2003 to take back-up offers."

On 12 September 2003, plaintiffs delivered Schmidt's estimate to Williams and again demanded the return of the \$10,500.00 deposit held in escrow. Defendants refused to release and return the escrow deposit.

Defendants contacted Marty Graff ("Graff"), a licensed contractor, to evaluate McLean's, Fluhrer's, and Schmidt's estimates. On 24 September 2003, Graff inspected the house and estimated the cost of repairs was less than \$10,000.00. Graff stated in his affidavit he repaired the defects as listed in the home inspections report for \$6,986.11. In August 2004, after the repairs were completed, the house appraised for \$1,029,000.00. Defendants sold the house to another buyer for \$1,020,000.00 on 10 August 2004.

On 10 May 2004, plaintiffs filed a complaint against defendants to recover the \$10,500.00 earnest money held in escrow. Plaintiffs alleged breach of contract, conversion, unjust enrichment, and sought a declaratory judgment. On 11 October 2004, defendants answered, raised the affirmative defenses of waiver, estoppel, set-off, and counterclaimed for breach of contract and sought a declaratory judgment.

On 17 February 2006, plaintiffs moved for summary judgment. On 27 February 2006, the trial court conducted a hearing and the trial court entered summary judgment in favor of plaintiffs on 1 March 2006. Defendants appealed.

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II. Issues

Defendants argue plaintiffs, not defendants, breached the Contract and summary judgment for plaintiffs is error.

III. Standard of Review

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact.

A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist.

Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (internal citations and quotations omitted), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). We review an order allowing summary judgment *de novo*. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

IV. Breach of Contract

"The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States . . . and protected by state constitutions." *Alford v. Insurance Co.*, 248 N.C. 224, 227, 103 S.E.2d 8, 10-11 (1958). "Persons . . . have a right to make any contract not contrary to law or public policy." *Fulcher v. Nelson*, 273 N.C. 221, 223, 159 S.E.2d 519, 521 (1968) (quoting 2 Strong, North Carolina Index 2d, Contracts § 1).

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“[W]hen parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish.” *Knutton v. Cofield*, 273 N.C. 355, 363, 160 S.E.2d 29, 36 (1968).

“The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.” *Electric Co. v. Insurance Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948); *see Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (When a court is asked to interpret a contract, its primary purpose is to ascertain the intention of the parties.). “The intention of the parties is gleaned from the entire instrument and not from detached portions.” *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 555 (1989).

“It is well settled that a contract is construed as a whole.” *Id.* “Individual clauses are to be considered in context.” *Id.* at 316, 385 S.E.2d at 555-56. “All parts of the contract will be given effect if possible.” *Id.* at 316, 385 S.E.2d at 556. “Where a contract confers on one party a discretionary power affecting the rights of the other, this discretion must be exercised in a reasonable manner based upon good faith and fair play.” *Mezzanotte v. Freeland*, 20 N.C. App. 11, 17, 200 S.E.2d 410, 414 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974). A contract that is plain and unambiguous on its face will be interpreted by the court as a matter of law. *Lane*, 284 N.C. at 410, 200 S.E.2d at 624-25.

In *Midulla v. Howard A. Cain, Inc.*, this Court affirmed summary judgment in favor of plaintiffs. 133 N.C. App. 306, 308-09, 515 S.E.2d 244, 246-47 (1999). The parties’ contract contained the same addendum that is before us here. *Id.* This Court held plaintiffs’ offer was contingent on a “[r]eview of covenants and restrictions, the body of which are satisfactory to Buyer.” *Id.* at 309, 515 S.E.2d at 246. Pursuant to the addendum to the contract, “plaintiffs had the discretion to cancel the Contract if they were not satisfied with the covenants and restrictions governing the area where the property was located.” *Id.*

This Court affirmed summary judgment for plaintiffs and held:

[t]he Contract gave plaintiffs the discretionary power to cancel the Contract if they were not satisfied with the covenants and

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restrictions. The record reflects that plaintiffs believed that “the covenants and restrictions exposed them to the risk of becoming obligated for payments in which they had an inadequate voice in approving.” Under the terms of the Contract, this would be an adequate reason to cancel the Contract.

Id. at 309-10, 515 S.E.2d at 247.

As stated above, the Addendum to the Contract included a “Cost of Repair Contingency” clause, which states:

9. COST OF REPAIR CONTINGENCY: If a reasonable estimate of the total cost of repairs required by Paragraph 12(b) and Paragraph 12(c) of the Offer to Purchase and Contract equals or exceeds \$10,000.00, then *Buyer shall have the option to terminate this Contract and all earnest monies shall be returned to Buyer.*

IN THE EVENT OF A CONFLICT BETWEEN THIS ADDENDUM AND THE OFFER TO PURCHASE AND CONTRACT, THIS ADDENDUM SHALL CONTROL.

(Emphasis supplied).

On 8 or 9 September 2003, plaintiffs obtained an estimate from McLean, a licensed North Carolina home inspector, and Fluhrer, a structural engineer, that the estimated total cost of repairs exceeded \$10,000.00. On 9 September 2003, plaintiffs faxed, and defendants received, a North Carolina Association of Realtors standard form “Termination of Contract and Release of Earnest Money” signed by plaintiffs. The form’s cover sheet stated “Buyer had decided to terminate contract per additional provisions addendum #9.” On 9 September 2003, defendants placed their house back on the market to accept back-up offers.

The Cost of Repair Contingency gave plaintiffs the discretionary power to terminate the contract. *See Midulla*, 133 N.C. App. at 307, 515 S.E.2d at 245 (The buyer’s contract to purchase was contingent upon a “review of covenants and restrictions, the body of which are satisfactory to Buyer.”); *see also Mezzanotte*, 20 N.C. App. at 13, 200 S.E.2d at 412 (The buyer’s contract to purchase was contingent upon the buyer’s ability “to secure a second mortgage from North Carolina National Bank on such terms and conditions as are satisfactory to them in order to finance the closing and to secure additional working capital.”).

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Plaintiffs also acted in a reasonable manner and in good faith and fair play when they promptly arranged and received a home inspection within the fourteen-day time frame stated in paragraph 12(b), even though the fourteen-day time period was not explicitly stated in the Cost of Repair Contingency Addendum.

Both McLean, a licensed home inspector, and Fluhrer, a structural engineer, notified plaintiffs within the fourteen-day period that structural problems existed with the house, and estimated repairs would exceed \$10,000.00. Plaintiffs notified Sewell, their broker, within the fourteen-day period that they intended to terminate the Contract pursuant to the Cost of Repair Contingency. Sewell notified Williams, defendants' broker, within the fourteen-day period through telecopy that "Buyer had decided to terminate contract per additional provisions addendum #9." Williams stated in her affidavit that "[t]he house was put back on the market on September 9, 2003 to take back-up offers."

Plaintiffs promptly and properly exercised their discretionary right to cancel the contract after determining the estimated cost of repairs within fourteen days, although they were not explicitly required to do so under the Addendum. Plaintiffs promptly notified Sewell, who notified Williams of plaintiffs' intent to terminate the Contract pursuant to the Cost of Repair Contingency. Plaintiffs promptly and properly terminated the Contract, which defendants acknowledged by placing the house back on the market for sale within fourteen days of the Contract. Plaintiffs are entitled to the return of their earnest money deposited with defendants. This assignment of error is overruled.

V. Conclusion

The contract was properly interpreted by the trial court as a matter of law. *Lane*, 284 N.C. at 410, 200 S.E.2d at 624-25. The trial court did not err by granting summary judgment in favor of plaintiffs and properly ordering the \$10,500.00 earnest money deposit to be returned to plaintiffs. The trial court's order is affirmed.

Affirmed.

Judge STEPHENS concurs.

Judge STROUD dissents by separate opinion.

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STROUD, Judge dissenting.

I conclude that there are genuine issues of material fact as to whether plaintiffs provided adequate notice of termination of the purchase contract and whether plaintiffs' termination of the contract was based upon a reasonable estimate of the cost of necessary repairs to the property. Accordingly, I would reverse the trial court order granting summary judgment in favor of plaintiffs and remand this case to Superior Court, Wake County for trial. For this reason, I respectfully dissent.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party," *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001); thus, facts asserted by the nonmoving party are presumed to be true, *see e.g., Norfolk & W. Ry. Co. v. Werner Indus. Inc.*, 286 N.C. 89, 97, 209 S.E.2d 734, 738 (1974), and the moving party carries the burden of proof to show that there is no triable issue of fact, *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 858 (1988). On appeal, this Court conducts *de novo* review of a trial court order granting summary judgment. *See Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

Defendants present two questions for review by this Court: (1) whether plaintiffs breached the purchase contract by failing to provide defendants with a list of necessary repairs within fourteen days of entering the contract and (2) whether plaintiffs breached the purchase contract by terminating the contract based on an unreasonable repair estimate. The trial court's order awarding summary judgment to plaintiffs is appropriate only if the pleadings, affidavits, and other evidence show as a matter of law that plaintiffs' termination was permitted by the purchase contract. Two clauses contained in the purchase contract govern my analysis of these issues: (1) contract clause 12, titled "Property Disclosure and Inspections" and (2) addendum clause 9, titled "Cost of Repair Contingency." The purchase contract entered into by the parties was a standard form "Offer to Purchase and Contract" jointly approved by the North Carolina Bar Association and the North Carolina Association of Realtors.

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Contract clause 12 defines plaintiffs' right to inspect the property and provides in pertinent part that

[a]ny inspections shall be completed and written notice of necessary repairs shall be given to Seller [defendants] on or before 14 days after acceptance. . . . [I]f any repairs are necessary, Seller [defendants] shall have the option of completing them or refusing to complete them. If Seller [defendants] elects not to complete the repairs, then Buyer [plaintiffs] shall have the option of accepting the [p]roperty in its present condition or terminating this contract, in which case all earnest monies shall be refunded.

(Emphasis added.) Addendum clause 9 permits plaintiffs to choose to terminate the contract and reclaim their earnest money “[i]f a reasonable estimate of the total cost of repairs” discovered pursuant to the inspections permitted by contract clause 12 “exceeds \$10,000.”

Because “contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible,” *International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 316, 385 S.E.2d 553, 556 (1989), this Court must first consider whether addendum clause 9 and contract clause 12 can be reconciled. I conclude that these clauses may be read together without conflict.

The plain language of addendum clause 9, expressly incorporates contract clause 12; thus, addendum clause 9 also requires the “estimate of the total cost of repairs” be provided to defendants “in writing . . . on or before 14 days after acceptance” of plaintiffs’ offer to purchase. If the clauses were read separately, then plaintiffs would be permitted to exercise an option to terminate at any time, even on the day of closing. This alternative interpretation, which is advanced by plaintiffs, is unsupported by the incorporation of contract clause 12 into addendum clause 9 and results in illogical and unintended consequences in the performance of the contract. The interpretation of these clauses is of particular concern because the “Offer to Purchase and Contract” at issue is a standard form contract which is used extensively in North Carolina real estate transactions.

Although plaintiffs notified defendants’ real estate agent by fax that they had “decided to terminate contract per additional provisions addendum #9” within 14 days of acceptance, it is undisputed that the fax did not state why plaintiffs were terminating the contract, did not include a list of necessary repairs, and did not contain an estimate of the cost of repairs. Plaintiffs did not provide any further details of

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their decision to terminate until after the 14 day period had passed. Considering this evidence in the light most favorable to defendants, I would hold that there is a question of material fact as to whether plaintiffs provided adequate notice of termination pursuant to contract clause 12 and addendum clause 9 of the “Offer to Purchase and Contract” entered into by the parties.

As stated above, addendum clause 9 is a “Cost of Repair Contingency” provision. The majority concludes that this clause gave plaintiffs “discretionary power to terminate the contract” subject only to a requirement that plaintiffs “act[] in a reasonable manner and in good faith,” citing *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E.2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E.2d 689 (1974) and *Midulla v. Howard A. Cain Co.*, 133 N.C. App. 306, 515 S.E.2d 244 (1999) in support of its decision. I find the contingency clauses at issue in *Mezzanotte* and *Midulla* dispository different from addendum clause 9.

In *Mezzanotte*, the real estate contract provided “[t]his agreement is contingent upon parties of the second part [plaintiff] being able to secure a second mortgage from North Carolina National Bank on such terms and conditions as are satisfactory to them in order to finance the closing and to secure additional working capital” 20 N.C. App. at 13, 200 S.E.2d at 412 (alteration in original) (emphasis added). In *Midulla*, the real estate contract provided that the plaintiffs’ offer to purchase was contingent upon “[r]eview of [residential] covenants and restrictions, the body of which are satisfactory to Buyer [plaintiffs].” 133 N.C. App. at 307, 515 S.E.2d at 245 (emphasis added). In both *Mezzanotte* and *Midulla*, this Court determined that the plaintiff buyers had discretionary power to terminate the respective real estate contracts because they were not “satisfied,” and the Court emphasized that an “implied promise of good faith and reasonable effort” accompanies any discretionary option to terminate a real estate contract that is contingent on one party’s “satisfaction.”¹ *Mezzanotte*, 20 N.C. App. at 17, 200 S.E.2d at 415; *Midulla*, 133 N.C. App. at 309, 515 S.E.2d at 246.

1. In *Midulla*, this Court reviewed a trial court’s entry of summary judgment against the sellers. 133 N.C. App. at 308, 515 S.E.2d at 245. Because the sellers did not offer any evidence of bad faith on the part of the buyers, this Court affirmed the trial court order; however, summary judgment would have been inappropriate in *Mezzanotte* if the plaintiffs’ affidavits had contained factual allegations giving rise to a jury question of bad faith, or, as in the case *sub judice*, reasonableness. *Id.* at 309, 515 S.E.2d at 246.

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In the case *sub judice*, plaintiffs' option to terminate the real estate contract is contingent on "a reasonable estimate of the total cost of repairs," not on an estimate that is satisfactory to plaintiffs.² Although discretionary in the sense that plaintiffs may choose to honor the purchase contract despite the existence of necessary repairs in excess of \$10,000, plaintiffs' right to terminate the contract pursuant to addendum clause 9 is expressly limited by the requirement that the estimated cost of repairs be reasonable. This means that to prevail on summary judgment, plaintiffs must show that they obtained a "reasonable estimate of the total cost of repairs" in excess of \$10,000.

Reasonableness is a quintessential jury question. *See Radford v. Norris*, 63 N.C. App. 501, 503, 305 S.E.2d 64, 65 (1983) ("Since the test is one of reasonableness, and depends upon the circumstances of the particular case, it is a jury question except in the clearest of cases."). North Carolina courts consistently hold that "reasonableness" is a factual issue for the jury in many different types of cases. *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224, 513 S.E.2d 320, 327 (1999) (The question of justifiable reliance in an action for negligent misrepresentation is "analogous to that of reasonable reliance in fraud actions, where it is generally for the jury to decide whether plaintiff relied upon the representations made by defendant.") (internal quotation omitted); *State Props. LLC v. Ray*, 155 N.C. App. 65, 73, 574 S.E.2d 180, 186 (2002) (In an action for fraud, "[t]he reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion."); *NationsBank of N.C., N.A. v. American Doubloon Corp.*, 125 N.C. App. 494, 499, 481 S.E.2d 387, 390 (1997) (The commercial reasonableness of a bank's retention of collateral after default on a loan

2. In *Mezzanotte*, this Court reviewed a judgment entered pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 following a bench trial. 20 N.C. App. at 14, 200 S.E.2d at 413. On appeal, this Court considered whether the trial court's findings of fact were supported by competent evidence and whether the court's findings of fact supported its conclusions of law. *See Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988) ("The standard by which we review the findings [of a trial court sitting without a jury] is whether any competent evidence exists in the record to support them."). This standard of review is significantly different from the standard at issue in the case *sub judice*, which requires this Court to determine whether there is a genuine issue of material fact for jury consideration. Moreover, in *Mezzanotte* the plaintiff buyers filed an action to enforce the contract for sale, and defendant sellers argued that the purchase contract was illusory because the contingency was based on plaintiffs' "satisfaction." 20 N.C. App. at 16-17, 200 S.E.2d at 414. Here, the issue is whether plaintiffs breached the contract, not whether the contract itself is supported by adequate consideration.

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“is a jury question and does not readily lend itself to summary judgment” because “reasonable minds may differ over what is commercially reasonable.”); *Smith v. Martin*, 124 N.C. App. 592, 600, 478 S.E.2d 228, 233 (1996) (The reasonableness of a plaintiff’s mitigation efforts in an action for wrongful cancellation of a deed of trust “depends upon the facts and circumstances of the particular case and is a jury question except in the clearest of cases.”); *Snead v. Holloman*, 101 N.C. App. 462, 467-68, 400 S.E.2d 91, 94 (1991) (The reasonableness of a plaintiff’s failure to follow medical advice in a negligence action is a jury question that is relevant to the amount of damages the plaintiff may recover.). However, by expressly determining that “[p]laintiffs acted in a reasonable manner and in good faith,” the majority removes this question from jury consideration and resolves the issue as a matter of law. Considering the evidence presented in the light most favorable to defendants, I would hold that there is a genuine issue of material fact as to whether the repair estimate obtained by plaintiffs was reasonable.

My decision is supported by the following evidence forecast by defendants: (1) plaintiffs’ initial estimate by McLean was based upon a cursory inspection during which McLean did not even look at the foundation under defendants’ house; even so, McLean gave the opinion that the foundation was settling and major repairs were needed, (2) the crack McLean observed on the exterior of the home was not an indication of settling at all but was actually a superficial defect caused by water dripping into the stonework from leaky gutters, (3) plaintiffs’ estimate of \$58,910.23 was not credible when considering that defendants actually completed the necessary repairs for \$6,986.11, and, (4) plaintiffs had given other reasons for wanting to terminate the contract that were unrelated to the condition of the house. From this evidence, a jury could find that plaintiffs’ repair estimate was unreasonable.

For the reasons stated above, I would reverse the trial court’s order awarding summary judgment to plaintiffs and remand this case to Superior Court, Wake County for trial. Accordingly, I respectfully dissent.

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STATE OF NORTH CAROLINA v. DAVON JAMAR ANDERSON, DEFENDANT

No. COA05-1520

(Filed 20 February 2007)

1. Kidnapping— home invasion—release in a safe place—more than relinquishing control required

There was sufficient evidence that the victims were not released in a safe place for the submission of charges of first-degree kidnapping to the jury where defendant participated a home invasion, moved the residents of the home within the house and garage, and fled the scene after an altercation with one of the residents and after the police were called. Defendant's constructive presence lingered, and release must be more than the relinquishment of dominion or control over a person.

2. Kidnapping— home invasion—confinement, removal or restraint—independent of burglary and armed robbery

The State presented sufficient evidence to allow the jury to conclude that defendant committed acts of confinement, removal, or restraint with respect to each victim separate and independent of his commission of burglary and armed robbery.

3. Evidence— victims upset—relevant to lives being threatened

There was no plain error in an armed robbery prosecution in the admission of testimony that the victims were upset, emotional, distressed, and scared during the crime. The testimony suggests that the victims' lives were endangered and threatened by defendant's actions; endangering or threatening human life is the gravamen of armed robbery.

4. Evidence— hearsay—defendant suspected by victim—other evidence of identity

There was no plain error in the admission of testimony from a detective that the victim of a home invasion had told him that he suspected defendant, even if this testimony was hearsay, where fingerprint evidence was sufficient to allow a reasonable jury to identify defendant as a perpetrator of the crimes.

5. Kidnapping— instructions—use of disjunctive—not consistent with indictment

There was no plain error in the jury instructions on kidnapping which used "or" between the methods of accomplishing the

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crime (confining, restraining, or removing) rather than “and” as used in the indictment.

6. Sentencing— plea bargain refusal mentioned—sentence less than plea bargain—no plain error

There was no plain error in the sentencing of defendant for armed robbery and kidnapping where the prosecutor mentioned defendant’s rejection of a plea bargain, but defendant did not object and received a lesser sentence than he would have received had he taken the plea bargain.

Appeal by defendant from judgments entered 5 May 2005 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 August 2006.

Attorney General Roy Cooper, by Assistant Attorney General Christopher W. Brooks, for the State.

McCotter, Ashton & Smith, P.A., by Rudolph A. Ashton, III and Kirby H. Smith, III, for defendant-appellant.

GEER, Judge.

Defendant Davon Jamar Anderson appeals from his convictions for one count of assault with a deadly weapon with intent to kill inflicting serious injury, one count of first degree burglary, three counts of robbery with a dangerous weapon, and six counts of first degree kidnapping. On appeal, defendant argues primarily that the trial court erred by denying his motion to dismiss the kidnapping charges for insufficiency of the evidence. Because we conclude that the State presented sufficient evidence to permit a jury to conclude that none of the victims was released by the defendant in a safe place and that each victim was subject to an act of confinement, restraint, or removal independent of that inherent in armed robbery and burglary, we disagree. Since we have found defendant’s other assignments of error to be without merit, we uphold his convictions and sentence.

Facts and Procedural History

The State’s evidence tended to show the following facts. Tamara Edwards lived in a rented house at 4613 Windmere Chase in Raleigh with her twelve-year-old son, D.E.; her seven-year-old daughter, C.E.; Edwards’ friend, Donyelle Norris; and Norris’ four-year-old daughter, D.N. Edwards’ boyfriend, Aaron Richards, also lived there. At about

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10:00 p.m. on the evening of 12 September 2004, the children were asleep in their bedrooms, Norris was in her bedroom, and Edwards and Richards were in their bedroom. When the doorbell rang, Richards went downstairs to answer the door. Through the door's window, he saw a person standing on the stoop holding a pizza box. Although no one in the household had ordered a pizza, Richards, assuming the pizza delivery man was at the wrong address, opened the door so that he could give directions.

As soon as Richards opened the door, the man on the stoop dropped the pizza box and entered the house. He was followed by defendant, who was wearing a black mask and had been standing unseen by the side of the house. Both intruders brandished guns and demanded drugs, money, and valuables from Richards. When Richards replied that he had nothing of value to give them, defendant put his gun in Richards' back and directed him upstairs to the bedroom he shared with Edwards. Defendant then took about \$30.00 out of Richards' wallet, which was sitting on the dresser.

Meanwhile, the other intruder, whose name was Antonio Teasley, woke the sleeping children and assembled all the occupants of the house except for Richards in Norris' bedroom. He then demanded money from Edwards and Norris. When defendant brought Richards down the hallway to Norris' bedroom, Richards claimed—in an attempt to draw defendant and Teasley away from the house—that he had money at another location. After conferring, the intruders agreed that Teasley would go with Richards to get the money, while defendant would stay at the house and guard the women and children.

After Richards and Teasley left, defendant began searching the house while continuing to demand money from the women. When the women insisted that they had none, defendant directed Edwards to begin filling trash bags with valuables, including Edwards' purse collection and a camcorder. He also took some jewelry from Edwards. He then tied the women's hands behind their backs with cord.

Meanwhile, Teasley conducted Richards at gunpoint downstairs and outside to the car in which Teasley and defendant had arrived. Teasley directed Richards to the passenger side, while he got in the driver's side. Teasley drove with the gun in his lap, while Richards used his cell phone to call Kenneth Kirby, Edwards' brother-in-law. He asked Kirby to "bring the money" and meet at a Food Lion near Kirby's house. Teasley and Richards drove to the Food Lion, and both men got out of the car to wait for Kirby. When Kirby arrived, Richards

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and he were able to overpower Teasley and take his gun. Kirby and Richards then forced Teasley into Kirby's car, and the three men returned to 4613 Windmere Chase.

When they arrived, they parked around the corner so defendant could not see that they had arrived in a different car. Richards knocked on the front door of the house. Defendant put his gun in Edwards' back and walked her down the stairs to answer the door. When defendant opened the door, he asked Richards about the money. Richards replied that Teasley was outside in the car, that he had the money, and that he was "ready to go." Defendant held Edwards and the gun with one hand and began trying to search Richards with the other, but Richards lunged at him and grabbed at the hand that held the gun. During the struggle, defendant shot Richards twice in the chest, once in the back, and once in the arm.

Defendant left Richards lying near the front door and fetched Norris from upstairs, leaving the children by themselves. He then forced Norris and Edwards into the garage at gunpoint. As they entered the garage, Edwards tripped and fell to the ground, blacking out as she did so. Defendant's gun went off as Edwards tripped, but the bullet lodged harmlessly in a car in the garage. Believing, however, that Edwards had been shot, defendant and Norris went back to the front of the house. As he was bringing Norris towards the front door, defendant heard Richards, who was still conscious, calling the police on his cell phone. Defendant shot his gun into the air two more times and then ran out the back door.

Defendant was later apprehended and charged with one count of assault with a deadly weapon with intent to kill inflicting serious injury, one count of first degree burglary, three counts of robbery with a dangerous weapon, and six counts of first degree kidnapping. Following a jury trial in May 2005, defendant was convicted on all counts. After defendant stipulated that his prior record level was III, the trial court imposed consecutive sentences as follows: 28 to 43 months on the assault conviction, 96 to 125 months on the first degree burglary conviction, 96 to 125 months for the consolidated robbery convictions, and 116 to 149 months for the consolidated kidnapping convictions. He filed a timely appeal to this Court.

Motion to Dismiss

[1] Defendant argues on appeal that the trial court erred by denying his motion to dismiss the charges against him for insufficiency of the evidence. Although defendant assigned error with respect to each of

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the charges brought, he confined the argument in his brief to the first degree kidnapping charges. We, accordingly, do not examine the trial court's denial of defendant's motion to dismiss the other charges. N.C.R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.").

In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404, 123 S. Ct. 488 (2002). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *Id.* (quoting *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162, 122 S. Ct. 2332 (2002)). In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State. *Id.*, 561 S.E.2d at 256.

Under N.C. Gen. Stat. § 14-39(a) (2005), a defendant is guilty of kidnapping if he "shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent," for one of four specified purposes, including "(1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or (2) Facilitating the commission of any felony . . . ; or (3) Doing serious bodily harm to or terrorizing the person" For the defendant to be convicted of first degree kidnapping, the State must also prove one of three additional elements: that the person kidnapped (1) was not released in a safe place, (2) was seriously injured, or (3) was sexually assaulted. N.C. Gen. Stat. § 14-39(b). In the absence of one of the elements set forth in N.C. Gen. Stat. § 14-39(b), the defendant is guilty of second degree kidnapping. *Id.*

Here, defendant argues that the State offered no evidence of the elements listed in § 14-39(b). The State relied upon the first element: the failure to release the victims in a safe place. This Court has recently held that a "release" is more than the mere "relinquishment of dominion or control over a person." *State v. Love*, 177 N.C. App. 614, 625-26, 630 S.E.2d 234, 242, *disc. review denied*, 360 N.C. 580, 636 S.E.2d 192-93 (2006). Rather, a "release" inherently contemplates an affirmative or willful action on the part of a defendant." *Id.* at

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625-26, 630 S.E.2d at 242. The *Love* Court stated that the defendants did not affirmatively or willfully release the victims when they bound the victims to chairs in their own home, ransacked the house for valuables, re-checked the bindings immediately before leaving, and threatened to return. The Court reasoned that although “defendants may have physically left the premises, . . . through their active intimidation, they left the victims with a constructive presence.” *Id.* at 626, 630 S.E.2d at 242.

With respect to Edwards and Norris, we hold that the State’s evidence was sufficient to allow the jury to consider whether they had been released in a safe place. With respect to the requirement of an affirmative and willful “release” under *Love*, Norris testified that after defendant fled, she was initially unsure as to his whereabouts. The police also felt that the scene was still unsafe when they arrived soon after Richards’ phone call. Thus, it is apparent that defendant’s “constructive presence” lingered, since the victims and, later, the police were uncertain as to whether defendant had actually relinquished his victims and vacated the premises. *Id.* at 625-26, 630 S.E.2d at 242. The fact pattern with respect to Edwards and Norris mirrors the fact pattern in *Love*, where the victims were left bound in their home with uncertainty as to the kidnappers’ whereabouts. In such circumstances, we believe that the facts, taken in the light most favorable to the State, permit a reasonable inference that no “release” took place.

With respect to the three children, again viewing the evidence in the light most favorable to the State, we also hold that there was sufficient evidence at trial to allow the jury to conclude that defendant did not “affirmative[ly] and willful[ly]” release them. *Id.* at 626, 630 S.E.2d at 242. Instead, the State’s evidence tended to show that defendant simply left the children upstairs in the same room where they were initially confined while he forced their mothers downstairs one by one. The Court in *Love* required “an affirmative action other than the mere departing of a premise.” *Id.* at 626, 630 S.E.2d at 242. A jury could have reasonably found that defendant simply departed the upstairs and engaged in no other affirmative action to release the children.

Finally, with respect to Richards, there was also sufficient evidence from which the jury could conclude that defendant did not “release” him. In fact, defendant merely entrusted Richards into the care of Teasley, instructing Teasley to take Richards elsewhere and force Richards to give him money. Moreover, Richards only obtained

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his freedom from Teasley when Richards and Kirby overwhelmed Teasley at the Food Lion. This Court has previously held that a victim's overpowering of his kidnapper does not constitute a release for purposes of first degree kidnapping. *State v. Raynor*, 128 N.C. App. 244, 251, 495 S.E.2d 176, 180 (1998) (victim overwhelmed defendant and his accomplice in victim's house, and defendant fled; victim not released in a safe place).¹

[2] Defendant also argues that the kidnapping charges should not have been submitted to the jury because there was no evidence of confinement, restraint, or removal beyond that inherent in the crimes of burglary and armed robbery. Our Supreme Court has held:

It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

State v. Fulcher, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978); *see also State v. Weaver*, 123 N.C. App. 276, 281, 473 S.E.2d 362, 365 (holding that a kidnapping conviction violates double jeopardy principles unless "the victim is exposed to greater danger than that inherent in the [separately punished crime] itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent" (quoting *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (internal quotation marks omitted))), *disc. review denied and cert. denied*, 344 N.C. 636, 477 S.E.2d 53 (1996).

In this case, we hold that the State presented sufficient evidence to allow the jury to conclude that defendant committed acts of confinement, removal, or restraint with respect to each victim, separate and independent of his commission of burglary and armed robbery. With respect to Edwards and Norris, defendant bound them *after he*

1. Because we have concluded that the State's evidence was sufficient to permit the jury to conclude that none of the kidnapping victims was released, we need not address defendant's argument that the house constituted a "safe place."

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had finished forcing Edwards to load valuables into the trash bags—an independent act of restraint separate from the armed robbery. Similarly, as to the three children, two of whom were under the age of eight, defendant subjected them to danger and abuse, as specified in *Weaver*, by awaking them in the night, confining them in a single room in the house, and brandishing a gun in their presence. Such acts were manifestly unnecessary to the completion of the burglary.² Furthermore, defendant held Edwards, Norris, and their children as hostages while he sent Teasley and Richards after money, and he later utilized both Edwards and Norris as human shields while negotiating with Richards. As we have noted, hostage-taking and the use of human shields are abuses specifically listed in the kidnapping statute, N.C. Gen. Stat. § 14-39.

Finally, with respect to Richards, the State's evidence showed that after defendant took Richards to his bedroom and stole the money from Richards' wallet, defendant proceeded to force Richards at gunpoint down the hallway to Norris' room where the rest of the household was assembled. This Court has previously held that taking a victim from one room to another room is an independent act of removal and restraint, when, as here, "the rooms where the victims were ordered to go did not contain . . . property to be taken." *State v. Joyce*, 104 N.C. App. 558, 567, 410 S.E.2d 516, 521 (1991), cert. denied, 331 N.C. 120, 414 S.E.2d 764 (1992).

In sum, we hold that the State presented sufficient evidence to permit a jury to conclude that none of the victims was released by defendant and that each victim was subject to an act of confinement, restraint, or removal independent of that inherent in armed robbery and burglary. Therefore, we conclude the trial court did not err by denying defendant's motion to dismiss the kidnapping charges.

Plain Error

Defendant also argues on appeal that the trial court committed plain error (1) by allowing Edwards and Norris to testify as to their emotional state as events transpired the night of the crime; (2) by allowing a police officer to testify about statements made to him by Richards during the investigation of the crime that ultimately led to the identification and arrest of defendant; and (3) by failing to properly instruct the jury on the elements of kidnapping. This Court may reverse for plain error

2. Defendant was not charged with armed robbery of the children.

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“only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a ‘fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused,’ or the error has ‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial’ or where the error is such as to ‘seriously affect the fairness, integrity or public reputation of judicial proceedings’ or where it can be fairly said ‘[the error] had a probable impact on the jury’s finding that the defendant was guilty.’ ”

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (first alteration in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513, 103 S. Ct. 381 (1982)).

A. Testimony from Edwards and Norris

[3] Defendant first contends that the trial court committed plain error by permitting Edwards and Norris to testify that they and the children were “upset,” “emotional,” “distress[ed]”, and “scared” while the crime was being committed. Defendant contends that this evidence was irrelevant. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C.R. Evid. 401.

We are not persuaded that the challenged evidence is irrelevant. N.C. Gen. Stat. § 14-87(a) (2005) defines armed robbery as occurring when “[a]ny person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes . . . personal property from another” Here, the testimony of Edwards and Norris as to their fright suggests their lives were endangered and threatened by defendant’s actions. Indeed, our Supreme Court has ruled that the endangering or threatening of human life is the “gravamen” of the offense of armed robbery. *State v. Beaty*, 306 N.C. 491, 499, 293 S.E.2d 760, 766 (1982), overruled on other grounds by *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988). Because we believe defendant is mistaken as to the relevance of the challenged testimony, we hold that the trial court did not commit plain error by admitting it.

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B. Detective Griffin's Testimony

[4] Defendant next assigns plain error to the trial court's admission of statements from Detective F. Griffin, Jr. First, defendant contends that Griffin's testimony that Richards told him he suspected defendant was the masked man amounted to inadmissible hearsay. Even assuming, without deciding, that this testimony constituted hearsay, we are unpersuaded that the testimony amounts to plain error in light of the fact that defendant's fingerprints were found both at 4613 Windmere Chase and on the car in which Teasley drove defendant to the Food Lion.³ Even if the statements by Detective Griffin were excluded, the fingerprint evidence alone is sufficient to allow a reasonable jury to identify defendant as a perpetrator of the crimes in question. Therefore, we cannot say that the admission of the statements resulted in a miscarriage of justice or had a probable impact on the outcome of the trial. *See Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

C. Jury Instructions

[5] Defendant next argues that the trial court committed plain error because the jury instructions on kidnapping did not parallel the language in the indictments. Each indictment in this case alleged defendant kidnapped the victim by "confining *and* restraining *and* removing" the victim (emphases added), whereas the trial court instructed the jury that it could find defendant guilty if it believed defendant "confined the person—that is, imprisoned him or her within a given area; restrained the person—that is, restricted his or her freedom of movement; *or* removed a person from one place to another." (Emphasis added.) Defendant assigns plain error to the trial court's use of the disjunctive "or" in the jury instructions rather than the conjunctive "and" used in the indictments.

This Court rejected an identical argument in *State v. Lancaster*, 137 N.C. App. 37, 48, 527 S.E.2d 61, 69, *disc. review denied in part and remanded in part*, 352 N.C. 680, 545 S.E.2d 723 (2000). In *Lancaster*, the Court noted that an indictment alleging all three kidnapping theories is sufficient to put a defendant on notice that he will have to defend on the basis of all three. *Id.* Therefore, the Court con-

3. With respect to these fingerprints, defendant contends that they were inadmissible because the State failed "to establish a foundation for why the Defendant-Appellant was required to give known fingerprint exemplars to the State." Since defendant has cited no authority suggesting that the State was required to establish such a foundation, we disregard this argument. N.C.R. App. P. 28(b)(6).

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cluded, a jury instruction that allows conviction upon any one of the three theories alleged in the indictment cannot be erroneous. *Id.* Since we find *Lancaster* to be materially indistinguishable from the present case, this assignment of error is overruled.

We note that defendant's reliance on *State v. Dominie*, 134 N.C. App. 445, 518 S.E.2d 32 (1999), is misplaced. In *Dominie*, this Court granted defendant a new trial after the indictment charged defendant only with "removing" the victim, but the trial court instructed the jury that it could convict defendant if it found he "restrained or removed" the victim. *Id.* at 448, 518 S.E.2d at 34. Such a situation is altogether different from the present case, in which all the theories upon which the jury was instructed appear in the indictment.

Mention of Plea Bargain During Sentencing

[6] Defendant's final argument on appeal assigns error to the sentencing phase of his trial, in which the prosecutor requested eleven consecutive sentences for defendant. In the course of the prosecutor's argument, he mentioned defendant's rejection of a plea bargain. We note that defendant did not object to this comment at the time it was made and that plain error review is limited to review of jury instructions and evidentiary matters. *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543, 121 S. Ct. 635 (2000).

Even assuming *arguendo* that defendant's objection was properly preserved for appellate purposes, we hold that any error that might have resulted from the prosecutor's argument was harmless. Defendant did not, in fact, receive the eleven consecutive sentences that the prosecution requested. Rather, the trial judge chose to consolidate the six kidnapping convictions and the three armed robbery convictions for sentencing purposes. As the State notes in its appellate brief, defendant actually received from the trial court a lesser sentence than he would have received had he accepted the prosecution's plea bargain—a convincing indication that defendant was not prejudiced by the prosecution's mention of defendant's rejection of the plea bargain. Accordingly, we overrule defendant's final assignment of error.

No error.

Judges CALABRIA and JACKSON concur.

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[181 N.C. App. 666 (2007)]

ALICE BINS RAINES, MICHELE R. ROTOSKY AND MADELINE DAVIS TUCKER,
PETITIONERS-APPELLANTS v. NORTH CAROLINA DEPARTMENT OF PUBLIC
INSTRUCTION AND STATE BOARD OF EDUCATION, RESPONDENTS-APPELLEES

No. COA05-1609

(Filed 20 February 2007)

1. Appeal and Error—improper application of de novo standard of review—remand not required

Although the trial court erred by its application of the de novo standard of review in a contested case hearing when it gave deference to the agency's expertise and consistency in applying various statutes, a trial court's use of an incorrect standard of review does not automatically require remand. In the instant case, the trial court's erroneous application of the de novo standard of review in no way interfered with the Court of Appeals' ability to assess how that standard should have been applied to the particular facts of this case, and thus, the merits of petitioner's arguments are reviewable.

2. Schools and Education—national board teaching certification—eligibility

The trial court did not err by concluding that petitioner's eligibility for the North Carolina National Board for Professional Teaching Standards program should be governed by N.C.G.S. § 115C-296.2 even though petitioner contends it had not yet taken effect when she completed the certification process, because: (1) N.C.G.S. § 115C-296.2 became effective on 1 July 2000; (2) petitioner's letter to the State Board dated 27 June 2001 stated that she was notified that she had achieved National Board Certification on 30 November 2000; and (3) the date when petitioner finished submitting her application materials is not the crucial date, but instead the date when the National Board deemed petitioner certified controls.

3. Schools and Education—national board teaching certification—salary increase

The trial court erred by withholding the twelve percent salary increase from petitioner, a career development education teaching coordinator, under North Carolina's National Board for Professional Teaching Standards program, because: (1) the goal of the incentive program is to encourage excellence and retain excellent teachers in the teaching profession; (2) N.C.G.S.

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§ 115C-296.2(b) makes no mention of classroom teachers; (3) although respondent contends the only NBPTS certification areas the General Assembly intended to include in the “other than direct classroom instruction” prong were media and school counseling, this limit is not reflected anywhere in the language of N.C.G.S. § 115C-296.2(b)(2)d; and (4) the National Board does not classify its certification areas as “classroom” areas of certification and “other than classroom instruction” areas of certification.

Appeal by Petitioner Madeline Davis Tucker from order and judgment dated 7 September 2005 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 22 January 2007.

Poyner & Spruill LLP, by Thomas R. West and Pamela A. Scott, for Petitioners-Appellants Madeline Davis Tucker.

Attorney General Roy Cooper, by Assistant Attorney General Laura E. Crumpler, for Respondents-Appellees.

ELMORE, Judge.

At issue in this case is whether Madeline Davis Tucker (petitioner) qualifies for a twelve percent salary increase under North Carolina’s National Board for Professional Teaching Standards program. We find that petitioner meets the requirements set out in N.C. Gen. Stat. § 115C-296.2(b) and therefore, we reverse the trial court’s judgment.

The National Board for Professional Teaching Standards (the National Board or NBPTS) is a nonprofit organization that grants certification to teachers across the country. Certification by the National Board is entirely voluntary for teachers, unlike mandatory state certification by our State Board of Education (State Board). At the time of the administrative hearing in this matter, the National Board offered certification in the following areas: Generalist, Art, Career and Technical Education, English as a New Language, English Language Arts, Exceptional Needs, Library Media, Mathematics, Music, Physical Education, School Counseling, Science, Social Studies-History, and World Languages Other than English. The National Board offered certification in Career and Technical Education for the first time in 1999.

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Our General Assembly, with the encouragement of then Governor James B. Hunt, Jr., initiated a program designed to give incentives to teachers who gain National Board certification. Originally, the benefits afforded NBPTS certified teachers were established by session law, but the provisions were ultimately codified into N.C. Gen. Stat. § 115C-296.2, effective 1 July 2000. As codified, the statute mandates that the State pay the participation fee, provide paid leave for eligible teachers who pursue certification, and “[pay] a significant salary differential to teachers who attain national certification from [the National Board.]” N.C. Gen. Stat. § 115C-296.2(a) (2005).

Petitioner is employed by Onslow County as a “Career Development Education Teaching Coordinator.” She is licensed by the North Carolina Department of Public Instruction (respondent) as a mentor, career development coordinator, business education teacher grades 9 through 12, and career exploration teacher grades 6 through 9. In her role, petitioner “provides support to vocational teachers, students and other vocational personnel within the local school system” and “helps teachers, students, and other vocational personnel use [a vocational tracking system] to improve the instructional process, document student learning, and improve vocational outcomes[.]” Petitioner’s responsibilities include working with teachers to prepare learning plans and to implement testing and documentation, “provid[ing] information/guidance to students for planning and updating career development plans,” and “coordinat[ing] efforts in helping students gain skills . . . related to employment.” Petitioner is also responsible for providing “career planning activities . . . for students” and “support and assistance for vocational programs to all teachers and students[.]” Finally, petitioner “serves to enhance the education process through providing services to students, teacher, principals, and others involved in the instructional process.”

Petitioner attended a seminar in October 1999 sponsored by respondent. According to the organizer of the seminar, Ken Smith (Smith), an employee of respondent, the purpose of the seminar was to provide information about the certification process and the advantages of becoming certified by the National Board. According to petitioner, the presenters at the seminar, Karen Garr, Office of the Governor; Tom Blanford, Executive Director of NC Teaching Standards Commission; and Angela Farthing, Executive Director of North Carolina Association of Educators, assured petitioner that she met the criteria to qualify for the salary increase if she were to successfully achieve NBPTS certification. Petitioner relayed this

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information to Smith, who encouraged petitioner to pursue NBPTS certification. According to petitioner, the presenters reiterated that as long as petitioner's salary code began with a "1," petitioner had three years of teaching experience in North Carolina, and petitioner was paid on the teacher salary scale, then Petitioner would be eligible for the NBPTS salary increase upon attaining NBPTS certification.

Petitioner began the NBPTS application process on 11 November 1999 by completing a form titled "North Carolina Department of Public Instruction National Board for Professional Teaching Standards Intent to Apply 1999-2000." The form included a promissory note in which petitioner promised to repay the application fee of \$2,000.00 if she did not complete the NBPTS certification process on or before 31 August 2000, or if she did not teach in a North Carolina public school for at least one year immediately after completing the process. The form also indicated that "[t]eachers holding National Board Certification will be paid, on an annual basis, a salary appropriate to the certification. (Currently, this is a 12% premium.)" The criteria for funding required applicants to be "state-paid teachers, [who] have taught [three] full years in North Carolina Public Schools . . . , hold a valid, clear, continuing North Carolina teaching license, and [who] have not previously received State funds for participating in the NBPTS assessment."

Petitioner completed her content knowledge examination on 19 June 2000. The National Board notified petitioner on 30 November 2000 that she had achieved NBPTS certification. However, in December, 2000, respondent informed petitioner that she would not receive the NBPTS salary increase. Petitioner, and several other individuals who were also denied the salary increase but who are not parties to this appeal, appealed respondent's decision by filing a petition for a contested case hearing on 27 December 2002.

Petitioner testified at the administrative hearing that although her office is located at the central office, she is paid on the teacher salary schedule and therefore is classified as a teacher. Petitioner indicated that she was not paid as an administrator, and did not receive the bonuses or extra leave days that administrators receive.

Philip Price (Price), respondent's Associate Superintendent for Financial and Business Services, and Gary Jarrett (Jarrett), respondent's Section Chief of School Personnel Support, testified for respondent. The substance of their testimony was that according to the agency's interpretation of North Carolina's NBPTS program,

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petitioner was not a “teacher” for purposes of the statute. Therefore, they testified, she was not eligible for the salary increase because the “other than classroom instruction” prong was designed to cover only those certified by the National Board in the areas of media and school counseling. Jarrett testified that the legislation did not include a list of particular fields in the “other than classroom instruction” paragraph in order to avoid having to revise the legislation each time the National Board added an additional “other than direct classroom instruction” field to their certification program. Jarrett also noted that the Salary and Benefits Manual treats central office administrators differently from teachers and instructional support personnel.

Administrative Law Judge Melissa Owens Lassiter (the ALJ) presided over the contested case hearing. The ALJ reversed respondent’s decision and ordered that petitioner receive the NBPTS salary increase from 1 July 2000. The State Board did not adopt the ALJ’s decision and issued a Final Decision, dated 2 September 2004, affirming respondent’s original decision to deny the salary increase. Petitioner filed a petition for judicial review with the Wake County Superior Court. The trial court affirmed the State Board’s decision in an order dated 7 September 2005. Petitioner appeals.

I. Standard of Review

[1] N.C. Gen. Stat. § 150B-51(c) (2005) governs judicial review in contested case petitions filed after 1 January 2001. The provision was added to the North Carolina Administrative Procedures Act (APA) in 2000, and provides, in pertinent part:

In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge’s decision, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency’s final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record.

Id. This provision requires the superior court, as the reviewing court, “to engage in independent ‘*de novo*’ fact-finding in all contested cases

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commenced on or after 1 January 2001 where the agency fails to adopt the ALJ's initial decision." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662-63, 599 S.E.2d 888, 897 (2004). The trial court's duty to engage in independent fact-finding is only triggered when the agency rejects the ALJ's decision. *Id.* In *Carroll*, our Supreme Court noted that N.C. Gen. Stat. § 150B-51(c) "does not redefine the 'de novo' standard governing judicial review over questions of law." *Id.* Thus, "under the *de novo* standard of review, the trial court consider[s] the matter anew and freely substitutes its own judgment for the agency's." *Id.* at 660, 599 S.E.2d at 895.

In *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 21, 590 S.E.2d 8, 13 (2004), this Court found that "[t]he legislative intent behind section 150B-51(c) [was] to increase the judicial scope of review in cases in which an agency rejects the ALJ's decision." In *Cape Medical*, we also cited one commentator's observation that N.C. Gen. Stat. § 150B-51(c) "makes clear that unlike the *de novo* review of questions of law under the traditional standard of review, in which the court might in some cases give 'some deference' even to questions of law, such deference is not to be given to any aspect of any prior decision in the case." *Id.*

N.C. Gen. Stat. § 150B-52 (2005) governs our Court's review of the trial court's judgment in a case arising from a contested case petition, and provides, in pertinent part:

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence.

Therefore, we must uphold the trial court's findings of fact if they are supported by substantial evidence, but, as in "other civil cases," we review the trial court's conclusions of law *de novo*.

As to appellate review of a superior court order regarding an agency decision, the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2), deciding whether the court did so properly.

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ACT-UP Triangle v. Commission for Health Services, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citations omitted).

In the judgment from which petitioner appeals, the trial court “reviewed the official record *de novo*, and [did] not [give] deference to any prior decision made in the case, except to the extent permitted by law[.]” However, the trial court further stated, “[w]hile this Court need not defer to any prior decision in the case, or give any greater weight to the Agency’s application of the law to the facts, the Court may nevertheless give appropriate weight to an Agency’s demonstrated expertise and consistency in applying various statutes.” Petitioner assigns error to the trial court’s application of the standard of review, arguing that the trial court improperly applied the *de novo* standard of review by deferring to respondent’s construction of the statute at issue. In response, respondent argues that it was proper for the trial court to “give appropriate weight to the agency’s demonstrated expertise and consistency in applying the relevant rules and statutes.”

The parties stipulated that the petition for contested case hearing in this matter was filed on 27 December 2002. Thus, the amended provisions of N.C. Gen. Stat. § 150B-51(c) and N.C. Gen. Stat. § 150B-52 apply to this case.

In this case, N.C. Gen. Stat. § 150B-51(c) mandated that the trial court apply *de novo* review, which the court recognized as the proper standard of review in its judgment. Thus, we must determine whether the trial court erred in giving “appropriate weight to an Agency’s demonstrated expertise and consistency in applying various statutes” when applying a *de novo* standard of review under N.C. Gen. Stat. § 150B-51(c).

The language of N.C. Gen. Stat. § 150B-51, as amended by the addition of subsection (c), expands the role of the trial court when the decision of the agency and the decision of the ALJ differ. The language added to the APA mandates that in situations where the agency does not adopt the decision of the ALJ, “the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law.” N.C. Gen. Stat. § 150B-51(c) (2005). In doing so, “the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency’s final decision.” *Id.* Deference to the agency is inconsistent with this mandate. We hold that the trial court erred in its application of the standard of review.

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However, “a trial court’s use of an incorrect standard of review does not automatically require remand.” *Vanderburg v. N.C. Dep’t of Revenue*, 168 N.C. App. 598, 607, 608 S.E.2d 831, 838 (2005).

[I]n cases appealed from an administrative tribunal under the APA, it is well settled that the trial court’s erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner’s asserted grounds for challenging the agency’s final decision warrant reversal or modification of that decision[.]

Carroll, 358 N.C. at 665, 599 S.E.2d at 898. In the present case, because “the trial court’s erroneous . . . application of the *de novo* standard of review in no way interferes with our ability to assess how that standard *should have been applied* to the particular facts of this case[,]” we review the merits of petitioner’s arguments. *Id.*

II. Law Governing Petitioner’s Eligibility

[2] Petitioner next argues that her eligibility for the North Carolina NBPTS program should be governed by Session Law 1999-237, § 8.7(a) because N.C. Gen. Stat. § 115C-296.2 had not yet taken effect when she completed the certification process. Accordingly, she contends that the trial court erred when it applied N.C. Gen. Stat. § 115C-296.2 to determine her eligibility for NBPTS certification benefits. We disagree.

N.C. Gen. Stat. § 115C-296.2 became effective on 1 July 2000. Prior to its enactment, the General Assembly set aside funds for North Carolina’s NBPTS program in its annual appropriations bill. *See*, 1999 N.C. Sess. 1999-237. Session Law 1999-237, § 8.7(a) requires respondent to fund payment of the participation fee and three days of leave for teachers who participate in the NBPTS program who “have completed three years of teaching in North Carolina schools” as defined by the provision, and who “have not previously received State funds for participation in any certification area in the NBPTS program.” *Id.* The session law also provides for the repayment of the participation fee if the teacher does not complete the application process or does not teach in a North Carolina public school for at least one year after completing the process. *Id.*

Petitioner maintains that the codified statute does not determine her eligibility because she completed the certification process before the statute became effective. Respondent contends that although

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petitioner completed the application and testing process in June, 2000, “the actual award of the certification itself did not occur until the fall of 2000, well after the effective date of the new statute[.]” On this point, we agree with respondent.

Petitioner completed her application on 11 November 1999, and completed her content knowledge test on 19 June 2000. However petitioner’s letter to the State Board, dated 27 June 2001, states that she “was notified that [she] had achieved National Board Certification” on 30 November 2000. Accordingly, petitioner was not “certified” by the National Board until November, 2000, after the statute had taken effect. The date when petitioner finished submitting her application materials is not the crucial date. Rather, the date when the National Board deemed petitioner certified controls. Accordingly, we now determine whether petitioner satisfies the statutory requirements of N.C. Gen. Stat. § 115C-296.2.

III. Statutory Interpretation of N.C. Gen. Stat. § 115C-296.2

[3] N.C. Gen. Stat. § 115C-296.2 governs North Carolina’s incentive program for teachers attaining National Board certification. Subsection (b)(2) defines “teacher” as follows a person who:

(2) a. Either:

1. Is certified to teach in North Carolina; or
2. Holds a certificate or license issued by the State Board of Education that meets the professional license requirement for NBPTS certification;
- b. Is a State-paid employee of a North Carolina public school;
- c. Is paid on the teacher salary schedule; and
- d. Spends at least seventy percent (70%) of his or her work time:
 1. In classroom instruction, if the employee is employed as a teacher. Most of the teacher’s remaining time shall be spent in one or more of the following: mentoring teachers, doing demonstration lessons for teacher, writing curricula, developing and leading staff development programs for teachers; or
 2. In work within the employee’s area of certification or licensure, if the employee is employed in an area of NBPTS certification other than direct classroom instruction.

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N.C. Gen. Stat. § 115C-296.2 (b)(2) (2005). The statute provides that the State will pay the NBPTS participation fee and provide up to three days of paid leave for teachers participating in the NBPTS program who have (1) taught for three years in North Carolina public schools, and (2) have not previously received NBPTS funds, have repaid those funds to the State, or have received a waiver of payment from the State Board of Education. N.C. Gen. Stat. § 115C-296.2(c) (2005). The teacher must repay the participation fee if the teacher does not complete the NBPTS certification process or does not teach in a North Carolina public school for one year after completing the process, unless the failure results from the death or disability of the teacher. N.C. Gen. Stat. § 115C-296.2(d)-(e) (2005). Finally, the statute gives the State Board the authority to adopt policies and guidelines to implement the program. N.C. Gen. Stat. § 115C-296.2(f) (2005).

“In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute.” *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). “In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish.” *Department of Correction v. Hill*, 313 N.C. 481, 458-86, 329 S.E.2d 377, 379-80 (1985).

Importantly, the NBPTS statute contains a statement of the State’s policy in subsection (a):

It is the goal of the State to provide opportunities and incentives for good teachers to become excellent teachers and to retain them in the teaching profession; to attain this goal, the State shall support the efforts of teachers to achieve national certification by providing approved paid leave time for teachers participating in the process, paying the participation fee, and paying a significant salary differential to teachers who attain national certification from the National Board for Professional Teaching Standards[.]

N.C. Gen. Stat. § 115C-296.2(a) (2005). Although respondent maintained throughout its brief that the purpose of the statute was to retain teachers in the classroom, such a goal is not reflected in the statutory language enacted by the General Assembly. Rather, the goal is to encourage excellence and retain excellent teachers in the “teaching profession.” This language makes no mention of “classroom teachers.”

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Further, N.C. Gen. Stat. § 115C-296.2(b)(2)d includes two distinct means of satisfying that part of the definition: the “classroom instruction” prong set forth in N.C. Gen. Stat. § 115C-296.2(b)(2)d.1., and the “other than direct classroom instruction” prong in N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. Respondent contends that the only NBPTS certification areas the General Assembly intended to include in the “other than direct classroom instruction” prong were media and school counseling. This limit is not reflected anywhere in the language of N.C. Gen. Stat. § 115C-296.2(b)(2)d, however, and other than respondent’s assurances, we can find no support for this proposition. The National Board does not classify its certification areas as “classroom” areas of certification and “other than classroom instruction” areas of certification. Thus, placing areas of NBPTS certification in these categories must come, if at all, from the language of our statute. We find no language which limits the “other than classroom instruction” to media and school counseling. *See* N.C. Gen. Stat. § 115C-296.2(b)(2)d.2. (2005).

Respondent points us to the distinct treatment afforded to “teachers” and “administrators” and states that “it cannot be presumed that the General Assembly was ignorant of them when it wrote the language in the statute at issue here.” Respondent’s interpretation of N.C. Gen. Stat. § 115C-296.2 conflicts with the language of the statute, as enacted by the General Assembly. Accordingly, we hold that respondent improperly withheld the salary increase from petitioner and we reverse the judgment of the trial court.

Reversed.

Chief Judge MARTIN and Judge STEELMAN concur.

IN THE COURT OF APPEALS

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HAILEY v. AUTO-OWNERS INS. CO.

[181 N.C. App. 677 (2007)]

JERRY A. HAILEY, JR., D/B/A HAILEY PROPERTIES, PLAINTIFF-APPELLEE V.
AUTO-OWNERS INSURANCE COMPANY, DEFENDANT-APPELLANT

No. COA06-187

(Filed 20 February 2007)

1. Declaratory Judgments; Insurance— commercial casualty insurance—premature invocation of appraisal clause

Plaintiff insured prematurely invoked appraisal under a commercial casualty insurance policy for damages to his properties in an ice storm because: (1) by the terms of the appraisal clause, it was contemplated that the parties would engage in some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist; (2) plaintiff's disagreement with defendant's adjustment of the claims was unilateral since plaintiff did not communicate to defendant any amount of loss greater than what defendant had already paid; (3) the unsupported opinion of the insured that the insurer's payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal; (4) to the extent defendant requested that plaintiff comply with plaintiff's post-loss duties prior to invoking appraisal, such compliance was a necessary condition precedent to the invocation of appraisal since otherwise those terms of the contract would be rendered meaningless; and (5) even assuming arguendo that the pertinent letter sent by defendant to plaintiff about the amount of loss from the inception of the ice storm claims served as a blanket denial of those claims, the parties still did not disagree on the amount of the losses pursuant to the appraisal clause since plaintiff failed to substantiate the amount of loss he allegedly sustained for each of the properties.

2. Appeal and Error— motion for stay pending appeal— mootness

Although defendant insurance company contends the trial court erred in a declaratory judgment action by denying its motion for stay pending appeal, this issue is dismissed as moot because the Court of Appeals already determined that appraisal should not have gone forward, and thus a determination of the propriety of the trial court's denial of defendant's motion for stay pending appeal can have no practical effect on the case.

HAILEY v. AUTO-OWNERS INS. CO.

[181 N.C. App. 677 (2007)]

Appeal by Defendant from judgment entered 29 June 2005 by Judge Kenneth C. Titus and from order entered 7 October 2005 by Judge Donald L. Smith in Superior Court, Wake County. Heard in the Court of Appeals 17 October 2006.

Armstrong & Armstrong, PA, by L. Lamar Armstrong, Jr., for Plaintiff-Appellee.

Brown, Crump, Vanore & Tierney, L.L.P., by O. Craig Tierney, Jr., for Defendant-Appellant.

McGEE, Judge.

Auto-Owners Insurance Company (Defendant) appeals from a declaratory judgment entered 29 June 2005 and from the denial of its motion for stay pending appeal. For the reasons stated below, we reverse the declaratory judgment and dismiss as moot Defendant's appeal of the denial of its motion for stay pending appeal.

Jerry A. Hailey, Jr., d/b/a Hailey Properties (Plaintiff) filed a complaint against Defendant seeking a declaratory judgment. Plaintiff alleged he owned several properties in Wake County that were insured with Defendant under a commercial all-risk property casualty insurance policy. Plaintiff alleged that his properties were damaged and filed damage claims with Defendant. Plaintiff alleged that Defendant made payments on the claims, but that Plaintiff later discovered the payments were insufficient to cover Plaintiff's losses. Plaintiff eventually invoked the appraisal clause under the policy, appointed an appraiser, and requested that Defendant appoint its appraiser. The parties' appraisers failed to agree on umpires, and Plaintiff petitioned the trial court to appoint umpires. The trial court appointed umpires for some of the claims. Defendant contended that Plaintiff was not entitled to petition the trial court for the appointment of umpires. Plaintiff sought a declaration as to the rights, liabilities, obligations, and interests of the parties.

Defendant filed an answer and counterclaim dated 7 May 2004. In its counterclaim, Defendant alleged that “[p]rior to demanding appraisal on these claims, [Plaintiff] failed to timely produce any documentation, invoices, bills, estimates, [or] cost of repair[] to support any claim in excess of what had already been paid for the subject claims, or to support [Plaintiff's] value of the claim[s].” Therefore, Defendant alleged, there was no disagreement between Plaintiff and Defendant as to the value of the claims, and Plaintiff's requests for appraisal were premature.

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Defendant's counterclaim extended to all of Plaintiff's claims, which included claims arising from (1) an ice storm on 5 December 2002, (2) a fire on 4 July 2003, and (3) a windstorm on 18 September 2003. Moreover, all of Plaintiff's properties that were allegedly damaged were listed under four insurance policies with Defendant. The sections of each policy, dealing with appraisal and duties in the event of loss, are substantially similar. The "appraisal" section of one of the policies provides that "[i]f we and you disagree on the value of the property or the amount of loss, either may make written demand for an appraisal of the loss." The policies define "we" as Defendant and "you" as Plaintiff. One of the policies provides the following "duties in the event of loss or damage":

a. You must see that the following are done in the event of loss or damage to Covered Property:

- (1) Notify the police if a law may have been broken.
- (2) Give us prompt notice of the loss or damage. Include a description of the property involved.
- (3) As soon as possible, give us a description of how, when and where the loss or damage occurred.
- (4) Take all reasonable steps to protect the Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the Limit of Insurance.
- (5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

(6) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this

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within 60 days after our request. We will supply you with the necessary forms.

- (8) Cooperate with us in the investigation or settlement of the claim.
- b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

The trial court entered a partial declaratory judgment on 9 September 2004, resolving the issue regarding Plaintiff's requests for the appointment of umpires in Plaintiff's favor. The trial court conducted hearings on Defendant's counterclaim on 9 and 10 June 2005. At the conclusion of Defendant's evidence, Plaintiff moved for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). The trial court granted Plaintiff's motion and entered a declaratory judgment on 29 June 2005.

The trial court made the following findings of fact, which Defendant challenges:

15. There is no word, phrase or other express linkage in the appraisal section to the duties after loss section and the appraisal section does not in any express manner provide any condition precedent to invoking appraisal other than the insured and insurer "disagree[.]".

...

17. The duties after loss section contains no word, phrase or other express linkage of any of the duties of the insured provided therein to the appraisal section and does not in any express manner provide that any duty listed therein is a condition precedent to invoking appraisal.

18. [Defendant] agreed that appraisal is a policy benefit that it was obligated to proactively and in good faith provide [Plaintiff] to the full extent to which [Plaintiff] was entitled.

19. Pursuant to insurance policies [Defendant] issued to [Plaintiff] that were in force at the time of [Plaintiff's] claims and applied to [Plaintiff's] claims, [Plaintiff] had a right to invoke appraisal as provided by the policies according to the sections described above.

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20. After the ice storm on 5 December 2002, [Plaintiff] gave prompt and proper notice of claims for damage to several of his properties insured by [Defendant].

...

24. On or about 11 January 2003, [Mr.] Wilson wrote a letter to [Plaintiff] advising that “*(. . .)[i]n looking at your claim, it has been determined that there was no physical damage to any of your property. Due to there being no damage to any of the dwellings or any other structures, [Defendant] is not in a position to make any payment[.]*”

...

26. [Defendant] and [Mr.] Wilson never retracted the letter.

27. The [Trial] Court relies on this testimony only for the purpose of finding that as a result of its blanket denial of ice storm claims, [Defendant] and [Plaintiff] disagreed from the inception of the claims.

28. On or about 27 February 2003, [Defendant] mailed checks to [Plaintiff] for amounts it determined unilaterally were appropriate for [Plaintiff's] ice storm claims.

...

30. Disagreement between [Defendant] and [Plaintiff] continued thereafter.

...

32. [Plaintiff] provided notice of [Plaintiff's] appointment of his appraiser and his demand for appraisal by sending a letter to [Defendant] through its agent, Darren Carrino, an independent agent with Craft Insurance Co., who forwarded notice to [Defendant].

...

36. One of [Defendant's] bases for its withdrawal from appraisal was that it did not “disagree” with [Plaintiff] because [Plaintiff] had not submitted a detailed written estimate that [Defendant] advised the policies required before [Plaintiff] was entitled to invoke appraisal.

...

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38. [Defendant's] response to all such requests for appraisal was substantially similar.

39. In all of these claims, [Defendant] refused to appoint an appraiser and refused to participate in appraisal or afford [Plaintiff] appraisal on the ground that [Defendant] did not "disagree" with [Plaintiff] as [Defendant] interpreted the policies.

40. In each case, [Defendant's] contention that it did not "disagree" with [Plaintiff] was based on its contention that it had a right to a detailed written estimate, with subsequent disagreement, before [Plaintiff] invoked appraisal.

...

42. Although [Defendant] had alleged in its Answer & Counter-claims that [Plaintiff's] conduct in failing to give notice to [Defendant] prior to approaching the Judge for umpire appointments was wrongful, [Defendant] conceded that neither the policy nor the law of North Carolina required notice.

43. [Plaintiff's] conduct in pursuing appointments of umpires was proper.

The trial court made the following conclusions of law, which Defendant challenges:

4. When [Plaintiff] did not agree with the positions taken by [Defendant] regarding its denial of ice storm claims, its payment of less than what [Plaintiff] thought he was entitled to receive, and the passage of time without further adjustment or payment, [Plaintiff] in the ordinary and plain meaning of the terms did "disagree" with [Defendant] as to "the amount of loss[.]"

5. The policies do not expressly create any other condition precedent to invoking appraisal other than the parties "disagree" as to "the amount of loss[.]"

6. Considering the lack of any term or provision in the appraisal section or in the duties after loss section that correlates one to the other, or in any way expressly conditions invocation of appraisal to the insured's satisfactory (to the insurer) compliance with duties after loss, the duties after loss section is not a condition precedent to invoking appraisal.

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8. [Defendant] implied and read into the appraisal section a condition precedent to appraisal that does not exist by the express terms of the policies.

...

11. [Plaintiff] was entitled to invoke appraisal and his demands for appraisal were not premature and were appropriate.

12. [Plaintiff] complied with the policies' terms and conditions in his petitions to appoint umpires.

The trial court declared and ordered that Plaintiff had complied with the policy terms and conditions related to invoking appraisal. The trial court also declared and ordered that the orders appointing umpires were valid and that appraisal was appropriate and could proceed.

Defendant filed a motion for stay pending appeal on 27 July 2005, which the trial court denied on 7 October 2005. Defendant appeals both the declaratory judgment and the order denying its motion for stay pending appeal.

I.

[1] Defendant argues the trial court erred by granting Plaintiff's motion for involuntary dismissal. Specifically, Defendant argues that Plaintiff prematurely invoked appraisal (1) before there was a disagreement as to the amount of loss and (2) before Plaintiff complied with his duties in the event of loss. "The proper standard of review for a motion for an involuntary dismissal under Rule 41 is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Dean v. Hill*, 171 N.C. App. 479, 483, 615 S.E.2d 699, 701 (2005). "The trial court's conclusions [of law], however, are completely reviewable." *Beck v. Beck*, 175 N.C. App. 519, 523, 624 S.E.2d 411, 414 (2006) (quoting *Baker v. Showalter*, 151 N.C. App. 546, 549, 566 S.E.2d 172, 174 (2002)).

This appears to be a case of first impression in North Carolina. However, in support of its argument that Plaintiff prematurely invoked appraisal, Defendant cites *U.S. Fidelity & Guar. Co. v. Romay*, 744 So. 2d 467 (Fla. Dist. Ct. App. 1999), where the District Court of Appeal of Florida, Third District, sitting en banc, considered three cases which presented identical issues. *Id.* at 468. In each case, the insureds' homes were damaged by Hurricane Andrew in August

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1992 and United States Fidelity & Guaranty Company (USF & G) paid the insureds' claims. *Id.* at 469. Between four and five years later, the insureds notified USF & G that they disputed the amount of loss. *Id.* The insureds demanded additional compensation and notified USF & G that they would invoke appraisal if payment was not made. *Id.* USF & G advised the insureds that prior to invoking appraisal, the insureds were required to comply with their duties after loss. *Id.* The insureds then filed petitions to compel appraisal. *Id.* Two insureds had submitted an unsworn damage estimate with their demand for payment and one insured "submitted nothing until the day the trial judge granted his motion to compel appraisal; he then filed a sworn proof of loss." *Id.* In two of the cases, the trial court granted the insureds' petitions to compel appraisal. *Id.* at 468. In the third case, the trial court entered summary judgment for USF & G, finding the insured's petition to compel appraisal premature. *Id.*

On appeal, the Court interpreted the appraisal provision in the parties' insurance contract, which read as follows: "If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss." *Id.* at 469. The Court held that

By these terms, the disagreement necessary to trigger appraisal cannot be unilateral. As expressly indicated in the parties' agreement, the failure to agree must be between the "you" and the "we." In other words, by the terms of the contract, it was contemplated that the parties would engage in some meaningful exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist.

Id. at 469-70. The Court quoted *Couch on Insurance* as follows:

"This means that the existence of a real difference in fact, arising out of an honest effort to agree between the insured and the insurer, is necessary to render operative a provision in a policy for arbitration of differences. Furthermore, there must be an actual and honest effort to reach an agreement between the parties, as it is only then that the clause for arbitration becomes operative, the remedies being successive."

Id. at 470 (quoting 14 *Couch on Insurance* 2d § 50:56 (rev. ed. 1982)).

The Court also stated that the parties contemplated an exchange of information prior to invoking appraisal by placing certain post-loss obligations on the insureds in the insurance contract. *Id.* Although

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the Court recognized, in its discussion of the appraisal process, that the appraisal clause did not make any reference to compliance with other policy provisions, “such an omission cannot be reasonably interpreted to mean, as the insureds would have us believe, that the insurer did not intend to place any conditions precedent to appraisal[.]” *Id.* at 471. The Court also stated that the omission of any reference to other policy provisions in the appraisal clause did not create an ambiguity in the insurance contract. *Id.* The Court held as follows:

No reasonable and thoughtful interpretation of the policy could support compelling appraisal without first complying with the post-loss obligations. If that were so, a policyholder, after incurring a loss, could immediately invoke appraisal and secure a binding determination as to the amount of loss. That determination, in turn, could be enforced in the courts. Under that framework, expressed and agreed-upon terms of the contract, i.e., the post-loss obligations, would be struck from the contract by way of judicial fiat and the bargained-for contractual terms would be rendered surplusage. There exists but one reasonable interpretation of the terms of the policy at issue here: The insured must comply with all of the policy’s post-loss obligations before the appraisal clause is triggered.

Id.

Accordingly, the Court reversed the two orders granting the insureds’ petitions to compel appraisal and remanded “with directions that the trial court require compliance with the policy’s preconditions to appraisal before granting motions to compel appraisal.” *Id.* at 472. The Court affirmed the order in the third case which granted summary judgment to USF & G. *Id.*

The Eleventh Circuit Court of Appeals followed *Romay* in *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771 (11th Cir. 2000). In *Galindo*, the insureds made claims on their insurance policies after they sustained property loss and damage from Hurricane Andrew. *Id.* at 773. The insurance companies paid the claims in 1992 and 1993 and the insureds accepted payment. *Id.* at 773 n. 1. Approximately four to five years later, the insureds contacted their insurance companies and demanded payment of supplemental claims on the basis of unsworn and unsigned damage estimates. *Id.* at 773. The insureds also told their insurance companies that the insureds would invoke appraisal if payment was not made within a few days. *Id.* The insurance compa-

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nies informed the insureds that appraisal was premature prior to an investigation of the supplemental claims. *Id.*

The insureds sought declaratory relief by compelling appraisal and the insurance companies removed the cases to federal court. *Id.* at 773-74. In each of the cases, the trial court “concluded that the insureds had prevented the insurance companies’ investigation of the supplemental claims, which was a condition precedent to either party’s demand for appraisal because of failure to agree regarding the loss amount.” *Id.* at 774. In each case, the trial court granted the insurance companies’ motions to dismiss and motions for summary judgment. *Id.* The Eleventh Circuit cited *Romay*, and held as follows:

Because we apply Florida law to resolve these consolidated appeals and the Florida Third District Court of Appeal has decided en banc in *Romay* that an insurance company must be given an opportunity to investigate a supplemental claim before there can be a disagreement between the parties regarding the amount of property loss or damage to effectuate appraisal, we AFFIRM.

Id. at 777.

We find these cases persuasive and now adopt the *Romay* and *Galindo* approach. In the present case, Plaintiff made claims on his policies for damage to his properties, and Defendant adjusted those claims and made payments to Plaintiff. Plaintiff then demanded appraisal on the basis that he disagreed with the amounts paid by Defendant. Defendant requested that Plaintiff provide Defendant with detailed estimates of damage to Plaintiff’s properties. Defendant also reminded Plaintiff of Plaintiff’s duties in the event of loss. However, Plaintiff did not provide Defendant with any documentation that the damage to any of Plaintiff’s properties was greater than the amount already paid by Defendant. In one case, Plaintiff did provide an estimated amount of loss, but did not provide any support for that estimate.

Pursuant to *Romay* and *Galindo*, Plaintiff in the present case prematurely invoked appraisal. In *Romay*, the Court held that by the terms of the appraisal clause in *Romay*, which is nearly identical to the appraisal clause in the present case, “the disagreement necessary to trigger appraisal cannot be unilateral.” *Romay*, 744 So. 2d at 469-70. By the terms of the appraisal clause, the Court continued, “it was contemplated that the parties would engage in some meaningful

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exchange of information sufficient for each party to arrive at a conclusion before a disagreement could exist.” *Id.* at 470. However, in the present case, Plaintiff’s disagreement with Defendant’s adjustment of the claims was unilateral. The trial court’s findings of fact reveal that Plaintiff did not communicate to Defendant any amount of loss greater than what Defendant had already paid. Rather, Plaintiff, when dissatisfied with the amounts he received from the settlement of his claims, immediately invoked appraisal. We hold that the unsupported opinion of the insured that the insurer’s payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal.

Moreover, *Romay* held that even though the appraisal clause did not refer to the insured’s post-loss duties, it was only reasonable to require compliance with those duties, to the extent requested, prior to invoking appraisal. *Id.* at 471. If such compliance were not required, an insured could immediately invoke appraisal after incurring a loss and obtain a binding determination of the amount of loss. *Id.* “Under that framework, expressed and agreed-upon terms of the contract, i.e., the post-loss obligations, would be struck from the contract by way of judicial fiat and the bargained-for contractual terms would be rendered surplusage.” *Id.* In the present case, to the extent Defendant requested that Plaintiff comply with Plaintiff’s post-loss duties prior to invoking appraisal, such compliance was a necessary condition precedent to the invocation of appraisal. Otherwise, those terms of the contract would be rendered meaningless. Accordingly, we reverse the trial court’s declaratory judgment and remand for entry of judgment for Defendant.

We note that the trial court found that, as a result of a letter sent by Defendant to Plaintiff, the parties disagreed on the amount of loss from the inception of the ice storm claims. While the parties did not include this letter in the record on appeal, the essential substance of the letter does appear in the record. We hold that even if this letter served as a blanket denial of Plaintiff’s ice storm claims, which we do not decide, the parties still did not disagree on the amount of the losses pursuant to the appraisal clause because Plaintiff failed to substantiate the amount of loss he allegedly sustained for each of the properties.

II.

[2] Defendant also argues the trial court erred by denying its motion for stay pending appeal. However, this issue is moot. “A case is

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'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). In the present case, because we have already determined that appraisal should not have gone forward, a determination of the propriety of the trial court's denial of Defendant's motion for stay pending appeal can have no practical effect on the case. Accordingly, this issue is moot and we dismiss this assignment of error.

Reversed and remanded in part; dismissed in part.

Judges MCCULLOUGH and GEER concur.

NANCY L. STONE, PLAINTIFF v. EDMOND SCOTT STONE, DEFENDANT

No. COA06-648

(Filed 20 February 2007)

1. Appeal and Error— preservation of issues—failure to include transcript—findings of fact presumed supported by competent evidence

The trial court did not err in an equitable distribution case by its findings of fact numbered 9, 25, and 26, because defendant failed to include a transcript of the hearing in the record, and thus, the court's findings of fact are presumed to be supported by competent evidence.

2. Divorce— equitable distribution—marital property—gifts—sufficiency of evidence

The trial court erred in an equitable distribution case by awarding plaintiff wife a lot valued at \$35,000 separate from the marital home because plaintiff had invested \$20,000 of her separate funds in the marital home and plaintiff's mother had given the parties \$15,000 during the marriage for improvements to the marital home, and the case is remanded for a new distributional order, because: (1) personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties is presumed to be marital property; (2) the practical effect of awarding the lot to plaintiff out-

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side the division of the other marital property was an unequal distribution of the marital estate; (3) the trial court expressly found that an equal distribution of the marital estate was equitable and did not find the existence of any distributional factor under N.C.G.S. § 50-20(c); and (4) the parties' marital home is titled as a tenancy by the entirety, and plaintiff's \$20,000 and her mother's \$15,000 totaling \$35,000 toward the marital home are presumed to be gifts to the marital estate.

Judge STROUD concurring in a separate opinion.

Appeal by defendant from judgment entered 18 January 2006 by Judge John M. Britt in Edgecombe County District Court. Heard in the Court of Appeals 10 January 2007.

W. Michael Spivey, for plaintiff-appellee.

Narron & Holdford, P.A., by I. Joe Ivey, for defendant-appellant.

TYSON, Judge.

Edmond Scott Stone ("defendant") appeals from judgment entered directing a distribution of the parties' marital and divisible property. We affirm in part, reverse in part, and remand.

I. Background

On 16 February 1991, Nancy L. Stone ("plaintiff") and defendant married. Two children were born of the marriage. On 22 June 2002, plaintiff and defendant separated. Defendant provided the primary residence for the two children and the parties shared custody of both children.

On 25 July 2002, plaintiff filed a complaint against defendant for child custody, child support, divorce from bed and board, and for equitable distribution. On 24 November 2003, the trial court entered an order, which granted the parties a divorce. On 18 January 2006, the trial court entered an order after finding an equal distribution of the marital assets was equitable. The trial court's order contained the following relevant findings: (1) an equal distribution of marital property was equitable; (2) the marital home in Macclesfield was marital property titled in tenants by the entirety; (3) Lot 1, Whispering Woods ("Lot 1"), a separate and distinct lot from the marital home, was marital property valued at \$35,000.00; (4) plaintiff invested \$20,000.00 of her separate funds into the purchase of the marital home; and (5)

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plaintiff's mother had given the parties \$15,000.00 during the course of the marriage for improvements to the marital home.

The trial court equally divided all marital property except Lot 1 valued at \$35,000.00. The trial court concluded plaintiff should retain ownership of Lot 1 as compensation for her and her mother's \$35,000.00 separate investments. Defendant appeals.

II. Issues

Defendant argues the trial court erred because: (1) no competent evidence supports findings of fact numbered 9, 25, and 26; (2) the trial court awarded plaintiff Lot 1 as compensation for her and her mother's separate \$35,000.00 investment; and (3) the findings of fact and conclusions of law which distributed marital property resulted in an unequal division and distribution of marital property to plaintiff and violated N.C. Gen. Stat. § 50-20(c).

III. Standard of Review

In *White v. White*, our Supreme Court set forth "the proper standard of review of equitable distribution awards" as follows:

Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. The legislature also clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. 50-20, but guided always by the public policy expressed therein favoring an equal division. The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catch-all factor codified in N.C.G.S. 50-20(c)(12).

It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal quotations and citations omitted).

IV. Findings of Fact

[1] Defendant argues no competent evidence supports findings of fact numbered 9, 25, and 26, which state:

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9. Plaintiff further *testified* that her Mother gave the parties \$15,000.00, during the course of the marriage, to pay for improvements made to a shop located behind the marital home.

25. The only remaining marital asset which has not been distributed consists of Lot 1 Whispering Woods with a value of \$35,000.00 as designated on Exhibit A (Lot (still owned)). The Plaintiff is entitled to be reimbursed for her \$20,000.00 investment of separate funds in the purchase of the marital home as well as the \$15,000.00 gift from her Mother used to improve the marital real property.

26. The Plaintiff is hereby awarded all right, title and ownership interest in Lot 1 Whispering Woods to compensate her for the \$35,000.00 investment referenced above in paragraph 25.

(Emphasis supplied). Defendant failed to include a transcript of the hearing with the record.

When “[t]he record does not contain [a transcript of] the oral testimony, . . . the court’s findings of fact are presumed to be supported by competent evidence.” *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 111, 598 S.E.2d 237, 245 (2004) (quoting *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975)). Past cases have reviewed the impact of failing to include a transcript in the record on appeal. Our review of appellate arguments is “hampered . . . [when] defendants have included no transcript or narration of the evidence upon which this Court can fully review this assignment of error.” *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

“The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the [trial court’s] findings of fact.” *Id.* When an appellant “fail[s] to include a narration of the evidence or a transcript with the record, we presume the findings at bar are supported by competent evidence.” *Davis*, 165 N.C. App. at 112, 598 S.E.2d at 245. Due to defendant’s failure to include a transcript of the testimony before the trial court in the record on appeal, all findings of fact, including 9, 25, and 26, are presumed to be supported by competent evidence. *Id.* This assignment of error is overruled.

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V. Lot 1

[2] Defendant argues the trial court's conclusions of law numbered 4, 5, and 6, awarding plaintiff Lot 1 are not supported by findings of fact numbered 8, 9, 25, and 26. Defendant asserts plaintiff was not entitled to be reimbursed \$35,000.00 allegedly paid from plaintiff and her mother's separate funds as a matter of law. We agree.

The trial court found Lot 1 to be marital property and entered the following findings of fact:

8. Plaintiff *testified* on September 20, 2004 that she paid a \$20,000.00 down payment toward the purchase of the parties' marital home using her *separate funds*.
9. Plaintiff further *testified* that *her Mother gave the parties* \$15,000.00, during the course of the marriage, to pay for improvements made to a shop located behind the marital home.
25. The only remaining marital asset which has not been distributed consists of Lot 1 Whispering Woods with a value of \$35,000.00 as designated on Exhibit A (Lot (still owned)). The Plaintiff is entitled to be reimbursed for her \$20,000.00 investment of separate funds in the purchase of the marital home as well as the \$15,000.00 gift from her Mother used to improve the marital real property.
26. The Plaintiff is hereby awarded all right, title and ownership interest in Lot 1 Whispering Woods to compensate her for the \$35,000.00 investment referenced above in paragraph 25.

(Emphasis supplied). The trial court entered the following conclusion of law:

6. The Plaintiff shall retain all right, title and ownership interest in Lot 1 Whispering Woods valued at \$35,000.00 for the purpose of compensating Plaintiff for the separate investment of \$35,000.00 by Plaintiff and her Mother toward the purchase and/or improvement of marital property.

"[A] presumption of a gift of separate property to the marital estate arises" when "a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling property as a tenancy by the entirety." *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988). N.C. Gen. Stat. § 50-20(b)(2) (2005) provides that "property acquired by gift from the

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other spouse during the course of the marriage shall be considered separate property" as a matter of law "if such an intention is stated in the conveyance." The contributing spouse may rebut this presumption by presenting clear, cogent, and convincing evidence that the investment was intended to remain separate property. *McLean*, 323 N.C. at 552, 374 S.E.2d at 382.

A. Equitable Distribution Analysis

"A trial judge is required to conduct a three-step analysis when making an equitable distribution of the marital assets." *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). "These steps are: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner." *Id.* (citing *Cable v. Cable*, 76 N.C. App. 134, 331 S.E.2d 765, *disc. rev. denied*, 315 N.C. 182, 337 S.E.2d 856 (1985)). "The initial obligation of the trial court in any equitable distribution action is to identify the marital property in accordance with G.S. 50-20 and the appropriate case law." *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987) (citing *Mauser v. Mauser*, 75 N.C. App. 115, 330 S.E.2d 63 (1985) (the trial court's order failed to list or determine the status of two bank accounts)). "A distribution order failing to list all the marital property is fatally defective, and, further, marital property may not be identified by implication." *Id.* (citation omitted).

[T]he court [is] required to identify the marital property with sufficient detail to enable an appellate court to review the decision and test the correctness of the judgment. The fact that there is evidence in the record from which sufficient findings *could* be made does not excuse the error.

Wade v. Wade, 72 N.C. App. 372, 376, 325 S.E.2d 260, 266 (citation omitted), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

"The purpose for the requirement of specific findings of fact that support the court's conclusion of law is to permit the appellate court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). "Although the trial court [is] not required to recite in detail the evidence considered in determining what division of the property

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would be equitable, it [is] required to make findings sufficient to address the statutory factors and support the division ordered." *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988). "When the findings and conclusions are inadequate, appellate review is effectively precluded." *Id.*

B. Findings of Fact

The trial court entered finding of fact numbered 8 that plaintiff *testified* \$20,000.00 was her separate property. Defendant failed to include a transcript with the record. As noted above, we presume this finding of fact is supported by competent evidence. *Davis*, 165 N.C. App. at 112, 598 S.E.2d at 245.

The trial court failed to classify either plaintiff's alleged separate \$20,000.00 or her mother's gift of \$15,000.00 as either separate or marital property. The trial court found plaintiff's mother's \$15,000.00 gift was given to "the parties . . . during the course of the marriage." "[P]ersonal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties" is presumed to be marital property. N.C. Gen. Stat. § 50-20(b)(1).

The parties agree that "the trial court may not consider . . . the source of a spouse's separate property as a distributional factor." *Daetwyler v. Daetwyler*, 130 N.C. App. 246, 251, 502 S.E.2d 662, 666 (1998) (The trial court improperly considered, as a distributional factor, that the parties each received their separate interests in the tree farm from the defendant's mother.), *aff'd per curiam*, 350 N.C. 375, 514 S.E.2d 89 (1999). Nonetheless, a spouse's separate investment in the marital home may be considered by the trial court as a distributional factor to support an unequal distribution of the marital estate. *Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242, *disc. rev. denied*, 346 N.C. 277, 487 S.E.2d 542 (1997); N.C. Gen. Stat. § 50-20(c)(12).

The practical effect of awarding Lot 1 to plaintiff outside the division of the other marital property is an unequal distribution of the marital estate. The trial court expressly found that an equal distribution of the marital estate is equitable and did not find the existence of any distributional factor pursuant to N.C. Gen. Stat. § 50-20(c). The parties' marital home is titled as a tenancy by the entirety. Plaintiff's \$20,000.00 and her mother's \$15,000.00 gift totals \$35,000.00 toward the marital home and is presumed to be gifts to the marital estate. The

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trial court's findings of fact are insufficient to support an unequal distribution of the marital estate.

The trial court failed to classify whether plaintiff's alleged \$20,000.00 contribution from her separate funds or her mother's \$15,000.00 gift to "the parties . . . during the course of marriage" were separate or marital property and failed to find or conclude whether plaintiff had rebutted the presumption that her \$20,000.00 contribution and her mother's \$15,000.00 gift were marital property. The trial court's findings of fact do not support the conclusion that plaintiff should be compensated "for the separate investment of \$35,000.00 by Plaintiff and her Mother toward the purchase and/or improvement of marital property." Remand is necessary for a new distributional order. *See Daetwyler*, 130 N.C. App. at 251, 502 S.E.2d at 666 (remand for new distributional order when trial court considered the source of property as a separate distributional factor). That portion of the trial court's order is reversed and remanded. Because we remand for further findings and conclusions and entry of a new distributional order, it is unnecessary to address defendant's third argument.

VI. Conclusion

In the absence of a transcript of the hearing, competent evidence is presumed to support all of the trial court's findings of fact, including 9, 25, and 26. The trial court's conclusions of law numbered 4, 5, and 6, awarding plaintiff Lot 1, are not supported by findings of fact numbered 8, 9, 25, and 26.

Gifts made to the parties during the marriage are presumed to be marital property. N.C. Gen. Stat. § 50-20(b)(1). On remand, the trial court must make additional findings of fact and conclusions of law to effect an equitable distribution, equal or unequal, of the marital property of the parties. If the trial court determines that an unequal distribution is equitable, the court must make the appropriate findings of fact regarding distributional factors pursuant to N.C. Gen. Stat. § 50-20(c). We reverse in part and remand for further proceedings consistent with this opinion.

Affirmed in Part; Reversed in Part, and Remanded.

Judge STEPHENS concurs.

Judge STROUD concurs by separate opinion.

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STROUD, Judge concurring.

I concur in the result reached by the majority and further agree that the trial court's award of "Lot 1 Whispering Woods" (Lot 1) to plaintiff for the purpose of compensating her for a \$35,000 separate investment into the marital home is unsupported by the findings of fact contained in the court's distributional order. This conclusion of law is reviewable *de novo*. *Shear v. Stevens Bldg Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). I write separately to clarify the rationale for my decision.

The trial court's distributional order contained the following relevant findings: (1) An equal distribution of martial property is equitable; (2) Lot 1 is marital property valued at \$35,000; (3) The marital home in Macclesfield is marital property; (4) The marital home in Macclesfield is owned by the parties as tenants by the entirety; (5) Plaintiff invested \$20,000 of her separate property to purchase the marital home; and (6) Plaintiff used a \$15,000 gift from her mother to improve the marital home. The trial court did not expressly classify the \$15,000 gift from plaintiff's mother as either the marital property or separate property of plaintiff. Coincidentally, the total of the sums invested by plaintiff into the marital home was \$35,000, and the value of Lot 1 was also \$35,000. Based upon these findings, the trial court awarded Lot 1 to plaintiff for the "purpose" of compensating her for her "separate investment." I concur with the majority that these findings are insufficient to support the award.

"[A] presumption of a gift of separate property to the marital estate arises" when "a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling property as a tenancy by the entirety." *McLean v. McLean*, 323 N.C. 543, 546, 374 S.E.2d 376, 378 (1988). The contributing spouse may rebut this presumption by presenting clear, cogent, and convincing evidence that the investment was intended to remain separate property. *McLean*, 323 N.C. at 552, 374 S.E.2d at 382. Additionally, N.C. Gen. Stat. § 50-20(b)(2) provides that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property" as a matter of law "if such an intention is stated in the conveyance."

Here, the parties' marital home is titled as a tenancy by the entirety. Therefore, plaintiff's entire \$35,000 investment in the home is presumed to be a gift to the marital estate. This is true notwithstanding the trial court's failure to clearly classify plaintiff's in-

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vestment of the \$15,000 gift from her mother. Because the trial court made no findings to rebut the presumption that either plaintiff's \$20,000 investment or \$15,000 investment was a gift to the marital estate, this property is presumed to be marital property for purposes of distribution. For this reason, the trial court's findings of fact are insufficient to support its conclusion that plaintiff is entitled to reimbursement for an investment of separate funds into the marital home.

Alternatively, a spouse's separate investment in the marital home may be considered by the trial court as a distributional factor to support an unequal distribution of the marital estate. *Collins v. Collins*, 125 N.C. App. 113, 116, 479 S.E.2d 240, 242, *disc. rev. denied*, 346 N.C. 277, 487 S.E.2d 542 (1997); N.C. Gen. Stat. § 50-20(c)(12) (2005). The practical effect of awarding Lot 1 to plaintiff outside the division of the other marital property is an unequal distribution of the marital estate.¹ However, the trial court expressly found that an equal distribution of the marital estate is equitable and did not find the existence of any distributional factor pursuant to N.C. Gen. Stat. § 50-20(c). For this reason, the trial court's findings of fact are insufficient to support an unequal distribution of the marital estate.

On remand, the trial court must make additional findings of fact and conclusions of law to effect an equitable distribution, equal or unequal, of the marital property of the parties.² If the trial court determines that an unequal distribution is equitable, the court must make the appropriate findings as to any distributional factors for which evidence was presented, pursuant to N.C. Gen. Stat. § 50-20(c).

For the reasons stated above, I concur.

1. Mathematically, the trial court's findings of fact established that plaintiff should pay defendant a distributive award of \$6,475.00. Instead, the court ordered defendant to pay to plaintiff a distributive award of \$11,025.00.

2. I also note that findings of fact numbers eight and nine in the trial court's distributional order are simply recitations of plaintiff's testimony. "[V]erbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505, n.1, 313 S.E.2d 193, 195, n.1, (1984). Although findings numbers eight and nine are not legally sufficient, the content contained therein is restated in finding of fact number twenty-five, which is a legally sufficient finding pursuant to N.C. Gen. Stat. § 1A-1, Rule 52(a). For this reason, this Court may review findings of fact eight and nine on appeal. *See Davis v. Harrah's Cherokee Casino*, 178 N.C. App. 605, —, 632 S.E.2d 576, 580 (2006).

IN RE C.P., L.P. & N.P.

[181 N.C. App. 698 (2007)]

IN THE MATTERS OF C.P., L.P., AND N.P., MINOR CHILDREN

No. COA06-1392

(Filed 20 February 2007)

1. Child Support, Custody, and Visitation; Indians— custody—Native American—Indian Child Welfare Act—tribal membership not established

The trial court did not abuse its discretion by finding that the Indian Child Welfare Act did not apply to a child custody case where the only evidence offered by the mother that she and the children were tribe members was her own word; no documentation was provided, and the Pokagen Band of the Potawatomi Indians did not respond to a letter mailed to them by DSS. The tribe can intervene at a later time if it determines that the mother and children are tribal members.

2. Child Abuse and Neglect— findings of neglect—supported by evidence

The trial court's findings indicating child neglect were supported by a DSS report, a Guardian ad Litem report, the summary of Family Preservation Services, and testimony from several witnesses, even if there was also evidence to support contrary findings.

3. Child Abuse and Neglect— conclusion that children neglected—supported by findings—no suggestion of lack of effort by mother

The trial court's conclusion that children had been neglected was supported by findings concerning problems shown by the children in the mother's care that were not present in foster care. While that conclusion is consistent with findings concerning the living conditions of the children, it does not suggest that the mother has not made efforts to learn to better care for the children or that the neglect was willful.

4. Child Support, Custody, and Visitation— custody order—no visitation findings—remanded

A child custody order was remanded where the court did not find that visitation would harm the children or provide for visitation.

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[181 N.C. App. 698 (2007)]

Appeal by Respondent-mother from order entered 11 August 2006, *nunc pro tunc* 24 July 2006, by Judge Edgar B. Gregory in District Court, Wilkes County. Heard in the Court of Appeals 17 January 2007.

Paul W. Freeman, Jr., for petitioner-appellee Wilkes County Department of Social Services.

Tracie M. Jordan, for petitioner-appellee Guardian ad Litem.

Rebekah W. Davis, for respondent-appellant.

WYNN, Judge.

Where an Indian child is involved in a custody proceeding, the Indian Child Welfare Act allows an Indian tribe to intervene to provide for placement with an Indian family or guardian if possible.¹ Here, Respondent-mother contends the trial court erred by failing to continue the case until such time as the Pokagen Band of Potawatomi Indians could intervene. Because Respondent-mother provided no evidence beyond her bare assertions that would prove the Indian Child Welfare Act should apply, we affirm the trial court's order. However, because the trial court failed to make any provisions for visitation between Respondent-mother and the older two children, as required by North Carolina General Statute § 7B-905(c), we remand for further proceedings as to placement and visitation.

According to the Wilkes County Department of Social Services (DSS), Respondent-mother and her three minor children, N.P., L.P., and C.P., have been directly involved in Case Management Services with DSS since 6 January 2006, when DSS substantiated an allegation of inappropriate discipline by Respondent-mother. DSS had earlier investigated, and failed to substantiate, five reports of abuse or neglect concerning Respondent-mother and her children.

At the time of the substantiated report in January 2006, Respondent-mother entered into a case plan with DSS that included family preservation services, child development assessment services for C.P., and mental health assessments for L.P. and N.P. A Certified Family Specialist worked with Respondent-mother and the three children for five weeks, completing the intensive family preservation services on 11 April 2006.

1. 25 U.S.C. § 1912(a) (2006).

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In late April 2006, Respondent-mother brought the three minor children at issue to DSS because of concern over serious bruises on much of C.P.'s body. Respondent-mother was worried that the older two children, L.P. and N.P., might have caused the bruises. The minor children were taken into DSS custody pursuant to an order for nonsecure custody filed on 23 April 2006. On 25 April 2006, DSS filed petitions to have the children adjudicated neglected because Respondent-mother had failed to provide them with proper care, supervision, or discipline. However, on 26 April 2006, blood tests and a doctor report to DSS confirmed that C.P.'s bruising was due to a condition called idiopathic thrombocytopenia, which results in a very low platelet count and means that even a simple fall off of a couch could result in severe bruises.

Nevertheless, on 2 May 2006, DSS substantiated its finding of neglect due to improper care, based largely on concern that Respondent-mother had waited approximately forty-eight hours after finding the bruises to seek medical care for C.P., as she stated that she was afraid DSS would take the children from her custody. Additionally, DSS noted in its petitions that Respondent-mother had on other occasions locked herself in her bedroom to be away from the children, that the two older children were left to act in a parental role for the youngest, and that one of the older children had taken a piece of broken glass to school as a potential weapon and had kept a knife underneath her bed. In its court report for the adjudication and disposition hearing, DSS recommended reunification of the family but stated that returning to Respondent-mother's custody was contrary to the best interests of the children because she does not "ha[ve] the appropriate skills to effectively parent the children."

Prior to the adjudication and disposition hearing, but after a hearing in which the trial court ordered that the children remain in DSS custody, Respondent-mother informed DSS that she and the children might be members of the Pokagen Band of Potawatomi Indians and that the Indian Child Welfare Act might therefore apply to their case. According to Respondent-mother, her own mother is the only person on the maternal side of her family who is not formally affiliated with the tribe. Respondent-mother formally applied for membership to the tribe during the course of the adjudication proceedings. The original hearing date for the proceedings was 5 June 2006, but the trial court allowed two continuances, until 17 July 2006, to allow the tribe time to respond to Respondent-mother's application or to intervene in the adjudication proceedings after they had been informed of the pending neglect action.

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The three children were in foster homes from April 2006 until the date of the adjudication and disposition hearing on 17 and 24 July 2006. At that time, the trial court found that the Indian Child Welfare Act did not apply, as Respondent-mother had presented no proof to the court of her tribal membership, nor had the tribe responded in any way to its notice of the neglect action. The trial court concluded that the minor children were neglected juveniles in that they had not received proper care, supervision, or discipline from Respondent-mother. He further concluded that it was contrary to the best interests of the children to be returned to the home of Respondent-mother and instead directed N.P. and L.P. to be placed in their father's home in Arkansas and for C.P. to remain in DSS custody and foster care, as his father was not a suitable placement.

Respondent-mother appeals from that order, arguing that (I) the trial court erred in concluding that the Indian Child Welfare Act did not apply and in failing to continue the hearing until the designated tribe had responded to Respondent-mother's application for membership; (II) the trial court's findings of fact were not supported by competent, clear, and convincing evidence; (III) the trial court's conclusion that the minor children are neglected was not supported by competent, clear, and convincing evidence or its findings of fact; and, (IV) the trial court erred in failing to provide for visitation by Respondent-mother of the minor children N.P. and L.P., as required by law.

I.

[1] First, Respondent-mother argues that the trial court erred in its finding that the Indian Child Welfare Act did not apply to this case, and by failing to continue the case until such time as the Pokagen Band of Potawatomi Indians had responded to the notice of the neglect action. We disagree.

The Indian Child Welfare Act (the "Act"), passed by Congress in 1978, is intended to regulate placement and custody proceedings involving Indian children in order to strengthen and preserve Native American families and culture. *See 25 U.S.C. §§ 1901 et seq.* (2006). In North Carolina, in order for the Act to apply, a proceeding must first be determined to be a child custody proceeding as defined by the Act itself, and it must then be determined that the child in question is an Indian child of a federally recognized tribe. *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644, *disc. review denied*, 359 N.C. 852, 619 S.E.2d 402 (2005). The burden is on the party invoking the Act to

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show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative. *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002).

According to the Act,

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a) (2006). These requirements of notice and time for preparation allow an Indian tribe to intervene in a pending custody proceeding in order to provide for placement with an Indian family or guardian if possible.

Additionally, an "Indian child's tribe shall have a right to intervene at any point in the proceeding" of any State court concerning the foster care placement of an Indian child. 25 U.S.C. § 1911 (2006). The Act further provides that, even after the conclusion of the proceedings, the tribe "may petition any court of competent jurisdiction to invalidate [any action for foster care placement or termination of parental rights under State law] upon a showing that such action violated" the sections of the Act that outline the proper procedures to follow. 25 U.S.C. § 1914 (2006).

Here, the trial court was informed by Respondent-mother, at the first scheduled adjudication and disposition hearing on 5 June 2006, that the Act might apply because she and the children might be members of the Pokagen Band of the Potawatomi Indians. In accordance with the provisions of the Act as to notice, the trial court ordered DSS to notify the tribe of the pending proceedings and their right to intervene, and then continued the hearing until 26 June 2006 to allow time for the tribe to respond. The record contains the letter that DSS sent to the tribe, as well as a signed return receipt indicating its effective delivery. When the hearing reconvened on

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26 June 2006, the trial court again continued the case, as the tribe had not yet responded.

When the hearing reconvened again on 17 July 2006, Respondent-mother requested another continuance but was denied. At that point, approximately thirty days had passed since the notification letter from DSS had been signed for at the address of the Pokagen Band in Michigan, with no response or action taken by the tribe. The only evidence offered by Respondent-mother that she and the children were tribe members was her own word; no other documentation was provided. The period of time that had passed exceeded the statutory requirements of the Act, and Respondent-mother failed to sustain her burden of proof to show the Act's applicability to the case at hand. Under these circumstances, we decline to find that the trial court abused its discretion in its finding that the Act did not apply, or in its refusal to continue the case. If the Pokagen Band determines that Respondent-mother and her children are tribe members, the tribe can still intervene at a later date to revisit the placement issues in question. Accordingly, we overrule this assignment of error.

II.

[2] Next, Respondent-mother argues that several of the trial court's findings of fact were not supported by competent, clear, and convincing evidence. Again, we disagree.

In North Carolina, a neglected child is defined in part as "one who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who is not provided necessary medical care; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C. Gen. Stat. § 7B-101 (2005). When reviewing a trial court's adjudication of a minor child as neglected, this Court must determine whether the trial court's findings of fact are supported by clear and convincing evidence and whether these findings of fact support the trial court's conclusions of law. *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000); see also N.C. Gen. Stat. § 7B-805 (2005) (requiring allegations of neglect to be proven by clear and convincing evidence). However, if supported by clear and convincing evidence, the trial court's findings of fact "are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

Here, Respondent-mother specifically challenges ten of the trial court's twenty-nine findings of fact, including that Respondent-

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mother delayed taking C.P. for medical treatment for his bruises because of her fear that DSS would take custody of the children, and that the minor children have had other disciplinary and developmental problems while in her care. She argues that the evidence supporting these findings was overly vague and does not meet the clear and convincing standard. However, after a careful review of the record, exhibits, and transcript, we find no merit to this contention.

The DSS court report, the Guardian ad Litem court report, the summary of Family Preservation Services, and testimony from several witnesses at the hearing, including two DSS social workers, all supported the findings of fact challenged by Respondent-mother, even if there was also evidence that could have supported contrary findings. Accordingly, this assignment of error is overruled.

III.

[3] Next, Respondent-mother argues that the trial court's conclusion that the minor children had been neglected was not supported by sufficient, competent, clear, and convincing evidence or findings of fact. We disagree.

Having determined that the trial court's findings of fact were, indeed, supported by clear and convincing evidence, we note that those findings included facts such as Respondent-mother's delay in seeking necessary medical care for C.P. for his bruising and disciplinary, behavioral, and developmental problems displayed by the children while in Respondent-mother's care that were not present after their placement in foster care. Such findings support the conclusion of law that the minor children are neglected, under the statutory definition provided in North Carolina General Statute 7B-101.

We emphasize, too, that when evaluating whether a child is neglected, the "determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent; the fact that the parent loves or is concerned about [the] child will not necessarily prevent the court from making a determination that the child is neglected." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). The trial court's findings went directly to the living situation of the children while with Respondent-mother, including whether their problems had persisted after being removed from her care. His conclusion of neglect is consistent with those findings but does not suggest Respondent-mother had not made efforts to learn how to better care for the children nor that her neglect of the children was willful. This assignment of error is therefore overruled.

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IV.

[4] Finally, Respondent-mother argues that the trial court erred in failing to provide for visitation between Respondent-mother and the two older children, L.P. and N.P., as required by North Carolina General Statute 7B-905. We agree.

According to North Carolina law, “[a]ny dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker . . . shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile’s health and safety.” N.C. Gen. Stat. § 7B-905(c) (2005). Moreover, “where custody is removed from a parent . . . the court shall conduct a review hearing within 90 days from the date of the dispositional hearing,” at which he should consider and make written findings of fact regarding, among other issues, “[a]n appropriate visitation plan.” N.C. Gen. Stat. §§ 7B-906(a),(c)(6) (2005); *see also In re E.C.*, 174 N.C. App. 517, 522, 621 S.E.2d 647, 651 (2005). Significantly, “[t]he trial court maintains the responsibility to ensure that an appropriate visitation plan is established within the dispositional order,” and cannot leave the question of visitation to the discretion of the appointed guardian. *Id.* at 522, 621 S.E.2d at 651.

Here, the trial court’s order concluded that it was consistent with the welfare of N.P. and L.P. to be placed with their father in Arkansas, and with the welfare of C.P. to remain in his foster care placement. It further concluded that it was consistent with the welfare of all of the children for DSS to “continue to utilize reasonable efforts to eliminate the need for placement of the children.” The order decrees that DSS “shall develop a schedule of gradual visitation between [C.P.] and his parents subject to the conditions set forth herein,” but no reference is made to visitation between Respondent-mother and N.P. and L.P., once they have been placed with their father in Arkansas. Nor are there any findings or conclusions that state—or even suggest—such visitation would not be in the best interests of N.P. and L.P. or would be otherwise inconsistent with their health and safety.

Furthermore, the record before us does not contain any documentation from the review hearing of N.P. and L.P.’s placement, scheduled for 21 August 2006, so we have no evidence of any findings, conclusions, or orders by the trial court as to visitation for Respondent-mother and the two older children. As such, the trial court essentially left the question of visitation to the discretion of the children’s father, an impermissible delegation of that authority. *In re*

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Custody of Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). Rather, in the absence of findings that a parent has forfeited her right to visitation or that it is in the child's best interest to deny visitation, "the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place[,] and conditions under which such visitation rights may be exercised." *Id.*

Because the trial court failed to make any findings that visitation would harm the minor children in question, or to otherwise provide for visitation between Respondent-mother and the children, we remand for further proceedings regarding visitation consistent with this opinion.

Affirmed in part, remanded in part.

Chief Judge MARTIN and Judge McGEE concur.

IN THE MATTER OF: A.S. AND M.J.W., MINOR CHILDREN

No. COA06-1028

(Filed 20 February 2007)

1. Child Abuse and Neglect— failure to receive proper care or supervision—abuse language mistakenly included in order

Although the trial court did not err by concluding that respondent father neglected both of his minor children, it erred by concluding that he abused M.W., because: (1) the minor children did not receive proper care or supervision and they lived in an environment injurious to their welfare; and (2) a review of the transcript revealed that language that could be interpreted that respondent abused M.W. was mistakenly included in the written adjudication order.

2. Child Abuse and Neglect— neglect—removal of custody—visitation

The trial court did not err in a child neglect case by removing custody of A.S. from respondent father and by denying unsupervised visits with M.W., because: (1) the trial court found that DSS made reasonable efforts to prevent or eliminate the need for placement with DSS, to reunify this family, and to implement a

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permanent plan for the minor child; and (2) the court found that the conditions which led to the kinship placement of both minor children still existed and that the return of the minor children to the home would be contrary to the welfare of the children.

3. Child Support, Custody, and Visitation—support—order to contact child support enforcement agency—absence of authority

The trial court erred by ordering respondent father to contact the child support enforcement agency without first establishing an appropriate amount of child support, because although a trial court may order a parent to pay a reasonable sum that will cover in whole or in part the support of a juvenile, N.C.G.S. § 7B-904(d) does not provide the trial court with authority to order respondent to contact a child support enforcement authority.

4. Child Abuse and Neglect— psychological evaluation—substance abuse assessment—parenting classes—best interests of child

The trial court did not abuse its discretion in a child neglect case by ordering respondent father to undergo a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes, because: (1) the trial court found that it was in the best interests of the minor children; and (2) DSS and the guardian ad litem recommended that it was in the best interests of the children.

Judge LEVINSON concurring in part and dissenting in part.

Appeal by respondent-father from judgments and orders entered 24 May 2006 by Judge Marvin P. Pope in Buncombe County District Court. Heard in the Court of Appeals 8 January 2007.

Michael E. Casterline for respondent-father appellant.

Michael N. Tousey for Guardian ad Litem appellee.

Matthew J. Middleton for Buncombe County Department of Social Services, petitioner appellee.

McCULLOUGH, Judge.

Respondent-father appeals from two district court adjudication judgments and dispositional orders that he abused and neglected M.W. and neglected A.S. We affirm in part and remand in part.

IN RE A.S. & M.J.W.

[181 N.C. App. 706 (2007)]

FACTS

Respondent-father ("respondent") is the biological father of A.S. and M.W. K.M. is the mother of A.S. and C.W. is the mother of M.W. Respondent and K.M. lived together with their child A.S. Pursuant to an agreement reached in September 2005 between respondent and C.W., M.W. stayed in the home of respondent and K.M. for a week at a time and then would live with C.W. for a week at a time.

On 7 February 2006, K.M. was at home with A.S. and M.W. She had given M.W. a bath and the child was fussy. K.M. became frustrated and pushed M.W. to the ground. The back of her head hit the floor and she became unresponsive. An ambulance was called and M.W. was transported to the emergency room for treatment of her head injuries. Detective Rickman of the Buncombe County Sheriff's Department interviewed K.M., and based on her admissions he placed her under arrest.

K.M. admitted to Social Worker Jo Ann Amato and Detective Rickman that on five previous occasions she had hurt M.W. by placing her down forcefully in her crib. She stated she knew she had hurt M.W. because the child winced and began to cry.

During the investigation, respondent admitted that K.M. had thrown objects such as a remote control and an alarm clock at him during the last several months in their home. On one occasion, respondent called law enforcement to their home because he felt that K.M. posed a danger to herself and to others. Law enforcement recommended that he go to the magistrate and have her involuntarily committed. He was unsuccessful. On another occasion, respondent admitted that he had to restrain K.M. after she became extremely agitated. Respondent was aware that K.M. was prescribed antidepressant medication for depression and knew that she had not been taking the medication consistently as prescribed.

On 24 February 2006, the Buncombe County Department of Social Services ("DSS") filed two verified juvenile petitions alleging that A.S. was a neglected child and that M.W. was an abused and neglected child. The matter was heard on 26 April 2006 and 28 April 2006. The trial court found that A.S. was a neglected child pursuant to N.C. Gen. Stat. § 7B-101(15) (2005) and that M.W. was an abused and neglected child pursuant to N.C. Gen. Stat. § 7B-101(1), (15).

Respondent appeals.

IN RE A.S. & M.J.W.

[181 N.C. App. 706 (2007)]

I.

[1] Respondent contends the trial court erred in concluding that A.S. was neglected and that M.W. was abused and neglected. We agree in part and disagree in part.

Respondent did not assign error to any findings of fact by the trial court, so the findings are presumed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). “The trial court’s ‘conclusions of law are reviewable *de novo* on appeal.’” *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citation omitted). We must determine whether the conclusions of law are supported by the findings of fact. *In re J.G.B.*, 177 N.C. App. 375, 381, 628 S.E.2d 450, 454 (2006).

We will first discuss the issue of whether the trial court correctly concluded that respondent neglected both A.S. and M.W. Then, we will discuss whether the trial court correctly concluded that respondent abused M.W.

A. Neglect

The North Carolina General Statutes define a neglected juvenile as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile’s parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile’s welfare; or who has been placed for care or adoption in violation of law. In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15).

The trial court concluded that respondent neglected both M.W. and A.S. because the minor children did not receive proper care or supervision and they lived in an environment injurious to their welfare. We believe the findings of fact support the trial court’s conclusion. With regard to both M.W. and A.S., the trial court found that respondent felt that K.M.’s behavior had made her a danger to herself and to others. Respondent admitted that K.M. had thrown household

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objects at him. Respondent even called law enforcement because of K.M.'s violent, erratic behaviors. Therefore, M.W. and A.S. were living in an environment injurious to their welfare. Accordingly, we disagree with respondent's contention regarding neglect.

B. Abuse

The North Carolina General Statutes define an abused juvenile as:

[a]ny juvenile less than 18 years of age whose parent . . . or caretaker:

- a. inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means; [or]
- b. creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means[.]

N.C. Gen. Stat. § 7B-101(1)(a), (b).

In the written adjudication order, the trial court included language that could be interpreted that respondent abused M.W. However, after reviewing the trial court's transcript, it appears that the language was mistakenly included in the written adjudication order. In addition, DSS stated in its brief that the "trial court did not find that the respondent . . . abused M.W. and such a finding of abuse was mistakenly included by the Department's attorney in the draft judgment." We agree and therefore remand this case to the trial court to amend the order.

II.

[2] Respondent next contends that the trial court erred in removing custody of A.S. from respondent and in denying unsupervised visits with M.W. on the basis that there was no evidence of neglect or abuse by respondent. We disagree.

After the incident on 7 February 2006, both of respondent's children were placed out of his home. A.S. was placed in a kinship placement with respondent's family. Respondent's visitation with A.S. was not limited. M.W. was placed with her mother, C.W., and respondent's visitation with M.W. was limited to two supervised visits per week.

The North Carolina General Statutes state:

Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or

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under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

N.C. Gen. Stat. § 7B-905(c) (2005).

In the instant case, the trial court did not err. In regard to both A.S. and M.W., the trial court found that DSS made reasonable efforts to prevent or eliminate the need for placement with DSS, to reunify this family, and to implement a permanent plan for the minor child. In addition, the court also found that the conditions which led to the kinship placement of both minor children still exist, and that the return of A.S. or M.W. to the home would be contrary to the welfare of the children. Therefore, we disagree with respondent's contention.

III.

[3] Respondent contends the trial court erred by ordering respondent to contact the child support agency without first establishing an appropriate amount of child support. We agree.

The North Carolina General Statutes provide that

when legal custody of a juvenile is vested in someone other than the juvenile's parent, if the court finds that the parent is able to do so, the court may order that the parent *pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered.* If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

N.C. Gen. Stat. § 7B-904(d) (2005) (emphasis added). In *In re Cogdill*, 137 N.C. App. 504, 528 S.E.2d 600 (2000), the trial court ordered the respondent to "contact the Child Support Enforcement Department and . . . file the necessary paperwork to begin paying child support[.]"

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Id. at 508 n.3, 528 S.E.2d at 602 n.3. In interpreting the previous version of N.C. Gen. Stat. § 7B-904(d), we stated:

Although section 7A-650 provides that a trial court may order a parent to '*pay a reasonable sum that will cover in whole or in part the support of the juvenile*,' the statute does not provide the trial court with authority to order a parent to contact a child support enforcement department.

Id. at 508 n.3, 528 S.E.2d at 603 n.3 (emphasis added) (citation omitted). We modified the trial court's order to exclude this portion of the order. *Id.*

In the instant case, the trial court ordered respondent to contact the Child Support Enforcement Agency and to pay child support for the benefit of A.S. and M.W. N.C. Gen. Stat. § 7B-904(d) does not provide the trial court with authority to order respondent to contact a child support enforcement authority. Therefore, we remand this case to the trial court to amend the order.

IV.

[4] Respondent finally contends the trial court erred in ordering respondent to undergo a psychological evaluation, have a substance abuse assessment and enroll in parenting classes. We disagree.

The North Carolina General Statutes permit the trial court at its discretion to

determine whether the best interests of the juvenile require that the parent . . . undergo psychiatric, psychological, or other treatment or counseling directed toward remediating or remedying behaviors or conditions that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent . . . If the court finds that the best interests of the juvenile require the parent . . . [to] undergo treatment, it may order that individual to comply with a plan of treatment[.]

N.C. Gen. Stat. § 7B-904(c).

In the instant case, the trial court was within its discretion. The trial court found that it was in the best interest of A.S. for respondent to have a psychological evaluation, participate in and complete parenting classes, and have a substance abuse assessment. Also, the trial court found that it was in the best interest of M.W. for respondent to

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have a psychological evaluation and pursue parenting classes. DSS recommended that it was in the best interest of A.S. and M.W. that respondent have a substance abuse assessment, have a psychological evaluation, and engage in parenting classes. Further, the guardian ad litem recommended that it was in the best interest of A.S. and M.W. for respondent to take parenting classes and have a substance abuse assessment. Therefore, we disagree with respondent's contention.

Affirmed in part and remanded in part.

Chief Judge MARTIN concurs.

Jude LEVINSON concurs in part and dissents in part.

LEVINSON, Judge concurring in part and dissenting in part.

I concur in the majority opinion except insofar as it requires the trial court to amend its order. Here, the trial court made the following relevant conclusion of law:

That by clear, cogent and convincing evidence, the minor child, M.J.W., is an abused child pursuant to N.C. Gen. Stat. § 7B-101(1) in that the minor child has been the victim of physical abuse by [mother], and that [mother] and respondent father inflicted or allowed to [be] inflicted upon the minor child a serious physical injury by other than accidental means. That the minor child is a neglected child pursuant to N.C. Gen. Stat. § 7B-101(15) in that the minor child did not receive proper care or supervision from [mother] and the respondent father, and that the minor child lives in an environment injurious to her welfare when living with [mother] and the respondent father.

The language of this paragraph appropriately concludes that M.J.W. had obtained the status of an abused and neglected juvenile. Moreover, the evidence and the findings of fact support the statements that the child had "been the victim of physical abuse by mother" and that "[mother] and respondent father inflicted or allowed to [be] inflicted upon the minor child a serious physical injury by other than accidental means." No corrections to the order are necessary.

As the parties discuss in their respective briefs, this Court recently published an opinion concerning the adjudication of juveniles' "status" as abused, neglected and/or dependent. *In re J.A.G.*, 172 N.C.

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App. 708, 617 S.E.2d 325 (2005) (Levinson, J. concurring) (quoting and applying *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984)). It is nonsensical for trial courts to adjudicate abuse, neglect and/or dependency “as to” certain parents or caretakers. Moreover, as the current order on appeal illustrates, it is unhelpful and confusing for our trial courts to make explicit conclusions of law that a child is abused, neglected and/or dependent “because” named person(s) committed certain acts.

It is the favored practice for trial courts’ findings of fact to set forth what certain persons did or did not do. This will suggest the relative culpability of the parents and/or caretakers that can help guide disposition decisions. At the same time, these findings of fact may be useful should one or more of the parties wish to assert collateral estoppel in subsequent hearings. Conclusions of law that a juvenile is abused, neglected and/or dependent need only track the statutory definitions themselves.

The brief for DSS counsel suggests an erroneous assumption that the trial court’s conclusions of neglect and abuse are tied to persons other than the juvenile herself. In other words, DSS assumes that a juvenile can, for example, be “abused as to mother” but not “abused as to father.” Or that a juvenile can be “neglected as to mother” but not “neglected as to father.” The trial court’s comments in open court concerning the court order suggest the trial court itself was concerned with whether the juvenile(s) would be abused and/or neglected “as to” one or both of the parents:

I wanted to clarify the adjudication. We were getting close to the end of the day and I’m not sure I made myself clear. [Mother], there is abuse and neglect conclusively shown as a caretaker of these children—I make specific findings that she was a caretaker of these children—by clear and convincing evidence. With regard to the respondent/father, I find neglect on his part—against both of the children for leaving the children with a caretaker that he knew had a history of domestic violence, of throwing things, and the fact that he actually felt it necessary to try to get her committed for mental illness, and the magistrate did not feel it was appropriate at that time. The significant thing is that the respondent/father felt that an issue existed. And he neglected his—he was caretaker of the child on this week-on, week-off custody arrangement with the respondent/mother, and he was neglectful for leaving the children with her, knowing her propensity for violence. As

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a custodial parent, he was responsible for providing a safe environment for both of his children.

I would affirm the order in all respects.

IN THE MATTER OF: D.S.A., A MINOR CHILD

No. COA06-1190

(Filed 20 February 2007)

1. Child Abuse and Neglect— jurisdiction—affidavit of child’s whereabouts

The omission of an N.C.G.S. § 50A-209 affidavit setting forth the present addresses and names of persons with whom the child has lived during the past five years does not by itself divest the trial court of jurisdiction in a termination of parental rights case, and there is no reason to hold differently in the case of a juvenile adjudication and disposition.

2. Child Abuse and Neglect— neglect—sufficient evidence

There was sufficient information to find that a juvenile was neglected where the trial court took judicial notice of files, documents, and orders without notice to the parties. A court may take judicial notice on its own motion, and while it is better practice to give express notice to the parties, it is not required. Furthermore, the court in a bench trial is presumed to disregard incompetent evidence.

3. Child Abuse and Neglect— custody with DSS rather than paternal grandparents—paternity not established

The trial court did not abuse its discretion by placing a juvenile in the custody of DSS when the parents were willing to place the juvenile with the paternal grandparents. The father had not submitted to paternity testing, though he did not deny being the father, DSS had not completed a home study of the paternal grandparents, and it could not be said that it was in the best interest of the juvenile to be placed in a home from which he could later be removed.

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4. Child Abuse and Neglect— custody of neglected juvenile with DSS—visitation in DSS discretion

The trial court erred by granting DSS the discretion to determine visitation between a neglected juvenile placed in the custody of DSS and the parents.

Judge LEVINSON concurring.

Appeal by respondent-parents from order entered 6 July 2006 by Judge Edgar B. Gregory in Yadkin County District Court. Heard in the Court of Appeals 22 January 2007.

Benjamin H. Harding, Jr., PLLC, by Benjamin H. Harding, Jr., for Yadkin County Department of Social Services, petitioner appellee.

Richard Croutharmel for respondent-mother appellant.

Annick Lenoir-Peek for respondent-father appellant.

Tracie M. Jordan for guardian ad litem appellee.

McCULLOUGH, Judge.

Respondent-parents appeal from an adjudication and disposition order adjudicating D.S.A. a neglected juvenile and placing custody of D.S.A. with Yadkin County Department of Social Services.

On 9 June 2006, Yadkin County Department of Social Services (“DSS”) filed a juvenile petition in Yadkin County District Court alleging that D.S.A. was an abused juvenile based on the contention that the minor child lived in an environment injurious to the child’s welfare. A hearing was held on 26 June 2006 on the petition. On 6 July 2006, the trial court entered a juvenile adjudication and disposition order finding and concluding that D.S.A. was a neglected juvenile and removing D.S.A. from the custody of respondent-parents. Respondent-parents appeal.

[1] Respondent-father contends that the trial court lacked jurisdiction where the juvenile petition failed to comply with the requirements set forth under N.C. Gen. Stat. § 50A-209 and therefore must be vacated.

N.C. Gen. Stat. § 50A-209 sets forth, “[i]n a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath

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as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period." N.C. Gen. Stat. § 50A-209(a) (2005). Respondent-father contends that where DSS failed to attach an affidavit as to the status of D.S.A. to the juvenile petition, the district court lacked subject matter jurisdiction.

N.C. Gen. Stat. § 7B-200 vests "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent" in the district court. N.C. Gen. Stat. § 7B-200(a) (2005). This Court has previously stated that the omission of an N.C. Gen. Stat. § 50A-209 affidavit does not by itself divest the trial court of jurisdiction in a termination of parental rights case, and we see no reason to hold differently in the case of a juvenile adjudication and disposition. *In re J.D.S.*, 170 N.C. App. 244, 249, 612 S.E.2d 350, 354, *cert. denied*, 360 N.C. 64, 623 S.E.2d 584 (2005). In *J.D.S.* this Court determined that the lower court retained exclusive, original jurisdiction over the action to terminate parental rights where such was granted by statute. *Id.* at 248-49, 612 S.E.2d at 353. It was further noted, "'[a]lthough it remains the better practice to require compliance with section 50A-209, failure to file this affidavit does not, by itself, divest the trial court of jurisdiction.' " *Id.* at 249, 612 S.E.2d at 354 (citation omitted).

In the instant case, statutory authority provided the lower court with jurisdiction; and where respondent-father's only contention on appeal supporting lack of jurisdiction is that the trial court was divested of such jurisdiction due to failure to attach the affidavit required under N.C. Gen. Stat. § 50A-209, this argument must fail.

[2] Respondent-parents argue on appeal that the trial court erred in finding and concluding that D.S.A. is a neglected juvenile where there was insufficient evidence to support such.

"The allegations in a petition alleging abuse, neglect, or dependency shall be proved by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2005). The role of this Court in reviewing an initial adjudication of neglect and abuse is to determine "(1) whether the findings of fact are supported by 'clear and convincing evidence,' and (2) whether the legal conclusions are supported by the findings of fact[.]" *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365 (2000) (citation omitted). "In a non-jury neglect [and abuse] adjudication, the trial court's findings of fact supported by clear and con-

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vincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997).

A neglected juvenile is defined as:

A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2005). The statute further states

In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Id.

The trial court found that D.W.G.B., the older sibling of D.S.A., was adjudicated abused and neglected on 25 August 2005. Respondent-mother's boyfriend, who was cohabiting with her at the time of the abuse, pled guilty to first-degree sexual offense with a child, first-degree sexual offense, sexual offense by a person in the position of a parent with a victim who is a minor residing in the home, taking indecent liberties with a child, felony child abuse inflicting serious bodily injury and crime against nature as to D.W.G.B. and was sentenced to 209 to 260 months' imprisonment. Respondent-mother has further been indicted for the crime of felony child abuse by a parent inflicting serious bodily injury and is awaiting trial on the indictment.

Each of these findings were supported by clear, cogent and convincing evidence in the record. These findings were based on files, documents, and orders to which the lower court took judicial notice. While respondent-mother contends that such evidence was considered in error due to the failure of the court to give notice to the parties that judicial notice was being taken and the possibility of the orders being subjected to a lower evidentiary standard, we find no merit in such contention.

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N.C. Gen. Stat. § 8C-1, Rule 201 states that a court may take judicial notice on its own motion. N.C. Gen. Stat. § 8C-1, Rule 201(c) (2005). Further, while it is the better practice to give express notice to the parties of the intention to take judicial notice of matters contained in the juvenile's file, it is not required. *In re M.N.C.*, 176 N.C. App. 114, 121, 625 S.E.2d 627, 632 (2006). Moreover, there is a "well-established supposition that the trial court in a bench trial 'is presumed to have disregarded any incompetent evidence.'" *In re J.B.*, 172 N.C. App. 1, 16, 616 S.E.2d 264, 273 (2005) (citation omitted) (finding no error in a trial court's decision to take judicial notice of prior orders contained in the juvenile's file).

It was further found that respondent-parents intended to take D.S.A. to their home and that the home was admittedly unsuitable for D.S.A. to live in. While there was evidence of an intention to place D.S.A. with the paternal grandparents, respondent-father testified at the hearing that he had been unable to convince respondent-mother of the plan and a social worker further testified that respondent-mother was not in favor of placing D.S.A. with the paternal grandparents and planned to take the child home with her.

Just as this Court decided in *In re A.B.*, 179 N.C. App. 605, 635 S.E.2d 11 (2006), where these findings of fact are supported by clear, cogent, and convincing evidence, it certainly follows that the conclusion of the trial court that D.S.A. is a neglected juvenile under the statute is supported by such findings of fact.

[3] Respondent-father next contends that the trial court erred in placing D.S.A. in the custody of DSS.

Specifically, respondent-father argues that the trial court erred in placing D.S.A. in the custody of D.S.S. where respondent-parents were voluntarily willing to place D.S.A. with relatives, namely the paternal grandparents. We disagree.

A dispositional order placing a juvenile in the custody of D.S.S. "(1) [s]hall contain a finding that the juvenile's continuation in or return to the juvenile's own home would be contrary to the juvenile's best interest" and "(2) [s]hall contain findings as to whether a county department of social services has made reasonable efforts to prevent or eliminate the need for placement of the juvenile[.]" N.C. Gen. Stat. § 7B-507(a) (2005).

N.C. Gen. Stat. § 7B-903 provides that in placing a juvenile outside of the home, "the court shall first consider whether a relative of the

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juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home." N.C. Gen. Stat. § 7B-903(a)(2)(c) (2005). However, the statute further provides that the court is not bound to place the child with such relative, if "the court finds that the placement is contrary to the best interests of the juvenile." *Id.* We review a trial court's determination as to the best interest of the child for an abuse of discretion. *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567, *disc. review denied, appeal dismissed*, 356 N.C. 163, 568 S.E.2d 608 (2002), *cert. denied*, 538 U.S. 982, 155 L. Ed. 2d 673 (2003).

In the instant case, the trial court found that, while respondent-father does not deny that he is the father of D.S.A., he has not submitted to paternity testing in order to confirm that he is in fact the father. Further, DSS had not completed a home study of the paternal grandparents to determine whether such home was a safe environment for D.S.A. It cannot be said to be in the best interest of D.S.A. to be placed in a home where he could later be subject to removal were it determined that respondent-father was not the biological father of D.S.A., and in turn that the paternal grandparents were not relatives. Such determination cannot be said to be an abuse of discretion.

[4] Respondent-parents further contend that it was error for the trial court to order that the visitation between respondent-parents and D.S.A. be in the discretion of DSS.

N.C. Gen. Stat. § 7B-905(c) (2005) specifically states in part that:

Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

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Id. Respondent-parents correctly note that this Court has found error in a trial court's decision to grant a custodial guardian discretion in determining visitation between parents and the minor child. *In re E.C.*, 174 N.C. App. 517, 621 S.E.2d 647 (2005). However, in contrast to the instant case, in *E.C.* and other unpublished opinions of this Court which have followed *E.C.*, the lower court granted discretion in a guardian other than DSS. Here, the trial court vested custody of D.S.A. in Yadkin County DSS.

As noted above, N.C. Gen. Stat. § 7B-905(c) states that when a juvenile is placed in the custody of a county department of social services, "the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court." *Id.* The statute further specifies that, "[i]f the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan." *Id.*

The trial court ordered "Visitation of D.S.A. by Jeremy S. [A.], Denise R. Bobbitt or any other person shall be in the discretion of the Yadkin County [DSS] at such time and on such terms and conditions as the Yadkin County [DSS] deems appropriate." DSS must submit such visitation plan, whatever that may be, to the court for approval, and therefore this case must be remanded for action in accordance with this opinion.

Pursuant to N.C. R. App. 28(b)(6) all other errors assigned by respondents but not brought forward on appeal are deemed abandoned.

Accordingly, the juvenile adjudication and disposition order is remanded for submission of a visitation plan to the court by DSS for approval.

Remanded.

Chief Judge MARTIN concurs.

Judge LEVINSON concurs with separate opinion.

LEVINSON, Judge concurring.

I write separately to clarify the reasons I believe the trial court erred by ordering that visitation between respondent-parents and the juvenile be in the discretion of DSS.

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Any dispositional order under which a juvenile is removed from the custody of a parent, guardian, custodian, or caretaker, or under which the juvenile's placement is continued outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile and consistent with the juvenile's health and safety. If the juvenile is placed in the custody or placement responsibility of a county department of social services, the court may order the director to arrange, facilitate, and supervise a visitation plan expressly approved by the court. If the director subsequently makes a good faith determination that the visitation plan may not be in the best interests of the juvenile or consistent with the juvenile's health and safety, the director may temporarily suspend all or part of the visitation plan. The director shall not be subjected to any motion to show cause for this suspension, but shall expeditiously file a motion for review.

N.C. Gen. Stat. § 7B-905(c) (2005) (emphasis added).

This statute provides that, in the event the juvenile is placed in the care of DSS, "the court" may require DSS to "arrange, facilitate, and supervise a visitation plan expressly approved by the court." In other words, the court must establish the visitation plan. This statute does not authorize DSS to do so. The provision in G.S. § 7B-905(c) affording the director of DSS to "temporarily suspend" visitation under certain circumstances does not suggest that DSS itself may, as in the instant case, be ordered to establish and implement its own plan. In authorizing the director of DSS to suspend visitation, the General Assembly was apparently concerned with those emergency circumstances where hearings before the trial court are not immediately practicable.

According to the majority opinion, DSS must submit a visitation plan "to the trial court for approval" on remand. My concern with the reasoning in the majority opinion is that it does not squarely conclude that the trial court erred by vesting discretion in DSS to determine visitation "at such time[s] and on such terms and conditions as [DSS] deems appropriate."

EVANGELISTIC OUTREACH CTR. v. GENERAL STEEL CORP.

[181 N.C. App. 723 (2007)]

EVANGELISTIC OUTREACH CENTER, A NORTH CAROLINA CORPORATION, PLAINTIFF V.
GENERAL STEEL CORPORATION, DEFENDANT

No. COA06-558

(Filed 20 February 2007)

1. Jurisdiction— in personam—waiver

The trial court did not err in a fraud, unfair and deceptive trade practices, and breach of contract case by denying defendant's motion to dismiss based on lack of in personam jurisdiction, because defendant waived the right to challenge the exercise of personal jurisdiction when: (1) defendant moved to dismiss for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1), but defendant did not cite Rule 12(b)(2) or move to dismiss based on lack of personal jurisdiction; and (2) the record does not contain any defense motion to dismiss for lack of personal jurisdiction.

2. Appeal and Error— appealability—denial of motion to compel arbitration—substantial right

Although defendant's appeal from the denial of its motion to compel arbitration and stay the proceedings pending arbitration is an appeal from an interlocutory order, an order denying arbitration is immediately appealable because it involves a substantial right that might be lost if appeal is delayed.

3. Arbitration and Mediation— denial of motion to compel—failure to produce evidence of agreement to arbitrate

The trial court did not err in a fraud, unfair and deceptive trade practices, and breach of contract case by denying defendant's motion to compel arbitration and stay the proceedings pending arbitration, because: (1) plaintiff testified by affidavit that the parties never agreed to submit their disputes to arbitration, and that plaintiff never received a copy of the conditions page or any other document referencing arbitration when it was faxed only the front side of the pertinent purchase order; (2) defendant failed to produce any evidence that plaintiff had received a page of conditions, such as a fax record, a conditions page signed or initialed by plaintiff, or a witness to negotiations between the parties about arbitration; and (3) the trial court's order clearly stated the basis for its denial of defendant's motion was defendant's failure to meet the threshold requirement that it show the existence of an agreement to arbitrate.

EVANGELISTIC OUTREACH CTR. v. GENERAL STEEL CORP.

[181 N.C. App. 723 (2007)]

Appeal by defendant from order entered 7 February 2006 by Judge Ripley Rand in Anson County Superior Court. Heard in the Court of Appeals 16 November 2006.

Law Office of Henry T. Drake, by Henry T. Drake, for plaintiff-appellee.

Kitchin, Neal, Webb, Webb, & Futrell, P.A., by Stephan R. Futrell, for defendant-appellant.

LEVINSON, Judge.

Defendant appeals from an order denying its motion to compel arbitration, to stay proceedings pending arbitration, and to dismiss plaintiff's lawsuit for lack of subject matter jurisdiction. We affirm.

Defendant, General Steel Corporation, is a Colorado company that sells prefabricated steel buildings. Plaintiff, Evangelistic Outreach Center, is a religious institution organized as a North Carolina non-profit corporation. In June 2004, plaintiff signed an agreement to buy a building from defendant. Thereafter, a dispute arose regarding the amount that plaintiff owed for the steel building. On 25 May 2005 plaintiff filed a complaint against defendant alleging fraud, unfair and deceptive trade practices, and breach of contract.

On 18 July 2005 defendant filed a motion to compel arbitration and to stay the proceedings pending arbitration, citing N. C. Gen. Stat. §§ 1-569.5 and 1-569.7. Defendant also moved to dismiss plaintiff's lawsuit for lack of subject matter jurisdiction, under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). On 7 February 2006 the trial court entered an order denying defendant's motion to compel arbitration and to dismiss plaintiff's complaint. Defendant appeals from this order.

[1] Defendant argues first that the trial court erred by denying its motion to dismiss, on the grounds that "North Carolina courts have no *in personam* jurisdiction over defendant[.]" We conclude that defendant waived the right to challenge the exercise of personal jurisdiction over it.

In the instant case, defendant moved to dismiss for lack of subject matter jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2005). However, defendant did not cite Rule 12(b)(2) or move to dismiss for lack of personal jurisdiction. Indeed, the record does not contain any defense motion to dismiss for lack of personal

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jurisdiction. The effect of this omission is addressed in N.C. Gen. Stat. § 1A-1, Rule 12 (2005), which provides in pertinent part that:

- (b) . . . Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading . . . except that the following defenses may at the option of the pleader be made by motion:
- (1) Lack of jurisdiction over the subject matter,
 - (2) Lack of jurisdiction over the person,
 - . . .
 - (g) . . . If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted[.] . . .
 - (h) . . . (1) A defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g)[.]

Rule 12(g) and (h) establish that, by failing to include a motion for dismissal under Rule 12(b)(2) with its motion under Rule 12(b)(1), defendant waived any challenge to personal jurisdiction.

Because defendant waived the issue of personal jurisdiction at the trial level, it is not properly before us for review. The pertinent assignments of error are overruled.

Defendant argues next that the trial court erred by denying its motion to compel arbitration and stay the proceedings pending arbitration. We disagree.

[2] Preliminarily we note that, although defendant appeals from an interlocutory order, “an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed.” *Tillman v. Commercial Credit Loans, Inc.*, 177 N.C. App. 568, 571, 629 S.E.2d 865, 869 (2006) (citing *Burke v. Wilkins*, 131 N.C. App. 687, 688, 507 S.E.2d 913, 914 (1998)).

“As a general matter, public policy favors arbitration.” *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 477, 583 S.E.2d 325, 330 (2003) (citation omitted). However:

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[T]his public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate. As the United States Supreme Court has stressed, “arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”

Sears Roebuck & Co. v. Avery, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 131 L. Ed. 2d 985, 993, (1995)).

Plaintiff herein testified by affidavit that the parties never agreed to submit their disputes to arbitration. “If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists. *See N.C.G.S. § 1-567.3[]*. ‘The question of whether a dispute is subject to arbitration is an issue for judicial determination.’” *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (quoting *Raspet v. Buck*, 147 N.C. App. 133, 136, 554 S.E.2d 676, 678 (2001)) (citing N.C. Gen. Stat. § 1-567.3, now replaced by N.C. Gen. Stat. § 1-569.7 (a)(2) (2005)). In the trial court’s determination of this issue:

“‘The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes’.... “‘The trial court’s findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary.’”

Slaughter, 162 N.C. App. at 461, 591 S.E.2d at 580 (quoting *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992), and *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002)) (citations omitted).

[3] In the instant case, the parties disputed the existence of an agreement to arbitrate. In support of its unverified motion to compel arbitration, defendant submitted a copy of the one page purchase order signed by plaintiff, which includes a notation that the agreement is subject to “terms and conditions on the face and reverse hereof,” and a copy of the back side of the purchase order, containing an arbitration clause. Defendant also offered the affidavit of defendant’s Customer Service Manager, stating that he faxed plaintiff both the front of the purchase order and the conditions page on the reverse

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side, and that plaintiff faxed back a signed copy of the purchase order front page.

Plaintiff opposed defendant's motion on the grounds that it had not agreed to arbitration. Plaintiff filed a verified response to defendant's request for admissions, denying that defendant had faxed the "conditions" page on the back of the purchase order. Plaintiff also submitted the affidavit of Hattie Cash, minister of Evangelistic Outreach, who averred that: (1) defendant never faxed plaintiff a second or back page to the purchase order; (2) plaintiff never received any documents from defendant that referred to arbitration; and (3) plaintiff had not entered into a contract with defendant that included arbitration.

The trial court denied defendant's motion in an order stating in relevant part that "[t]he Defendant has failed in its burden of proof to prove that there was an agreement between the parties to arbitrate." Thus, the trial court denied defendant's motion on the grounds that proof of the very existence of an arbitration agreement was lacking. We conclude that the evidence supports this conclusion.

Defendant, however, asserts that the trial court erred by denying its motion to compel arbitration, notwithstanding plaintiff's sworn denial that it ever received a copy of the conditions page or any other document referencing arbitration. Defendant cites no authority for this contention, and the relevant precedent suggests otherwise.

For example, in *Sciolino*, 149 N.C. App. at 644, 562 S.E.2d at 65, plaintiffs signed an account application stating in part that their signatures represented an acknowledgment that they had "read, understand, and agree to be bound by the terms of the attached Customer Agreement" and that the "enclosed Customer Agreement" included an arbitration clause. The trial court found in part that "Plaintiffs deny having been provided with a copy of the customer agreement. [Plaintiff] testified, by affidavit, that he had searched his files, and did not have a copy of a customer agreement. . . . Plaintiffs have disputed the existence of an agreement to arbitrate. After having conducted a plenary hearing, the court finds that the existence of an agreement to arbitrate has not been demonstrated." *Id.* at 643-44, 562 S.E.2d at 65. This Court upheld the trial court's ruling:

Plaintiffs deny . . . that defendants attached any type of document to the application. . . . [Defendants offered two] customer agreements, neither of which is attached to the application . . . and nei-

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ther of which bears plaintiffs' signatures. . . . Defendants produced no evidence that plaintiffs actually received either customer agreement[.] . . . Thus, there was competent evidence before the trial court that defendants failed to attach a customer agreement to the account application. . . . In light of the lack of evidence presented by defendants in support of their contention that plaintiffs agreed to arbitrate their claim, we hold that the trial court properly concluded that defendants failed to demonstrate that there was a valid agreement to arbitrate.

Id. at 646, 562 S.E.2d at 66-67; *see also*, e.g., *Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580 (upholding trial court's finding that defendant failed to meet burden of proof on existence of an arbitration agreement).

In the instant case, as in *Sciolino*, plaintiff denied receiving a document containing an arbitration clause, and asserted that defendant faxed only the front side of the purchase order. Defendant submitted an affidavit that it had faxed both sheets, but conceded that plaintiff only returned a front page. Defendant failed to produce any evidence that plaintiff had received a page of conditions, such as a fax record, a conditions page signed or initialed by plaintiff, or a witness to negotiations between the parties about arbitration. We conclude that, as in *Sciolino* and similar cases, competent evidence supported the trial court's finding that there was no agreement to arbitrate. This assignment of error is overruled.

Defendant also argues that we should reverse the trial court's order on the grounds that it contains insufficient findings of fact to permit appellate review. In support of this assertion, defendant cites *Ellis-Don Constr., Inc. v. HNTB Corp.*, 169 N.C. App. 630, 610 S.E.2d 293 (2005), in which this Court remanded for further findings by the trial court. However, *Ellis-Don* and cases similar to it are easily distinguishable from the instant case. In *Ellis-Don*, the trial court's order stated simply that upon "reviewing all matters submitted and hearing arguments of counsel, the Court is of the opinion that both motions should be denied." *Id.* at 634, 610 S.E.2d at 296. This Court reversed and remanded:

the trial court's order does not indicate whether it determined if the parties were bound by an arbitration agreement. While denial of defendant's motion might have resulted from: (1) a lack of privity between the parties; (2) a lack of a binding arbitration agreement; (3) this specific dispute does not fall within the scope of

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any arbitration agreement; or, (4) any other reason, we are unable to determine the basis for the trial court's judgment.

Id. at 635, 610 S.E.2d at 296. In the instant case, however, the trial court's order clearly states that the basis for the trial court's denial of defendant's motion was defendant's failure to meet the threshold requirement that it show the existence of an agreement to arbitrate.

Moreover, the evidence in the present case was simple, and the issue very clear. The question before the trial court was whether, in the face of plaintiff's sworn denial that it had received any information about arbitration, the statement on defendant's purchase order that referenced "conditions" on "the reverse hereof" was enough to meet defendant's burden to show that the parties mutually agreed to arbitration. The trial court's ruling was necessarily based on defendant's failure to produce evidence that plaintiff received, and agreed to, the arbitration clause on the back of the purchase order. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err by denying defendant's motion to compel arbitration and that its order should be

Affirmed.

Judges GEER and JACKSON concur.



RAMBOOT, INC. d/b/a B&R LANES; BERLEY L. BUCK, INDIVIDUALLY; AND CASSIE L. BUCK, INDIVIDUALLY, PLAINTIFFS v. ROBERT V. LUCAS AND LUCAS, BRYANT, DENNING & ELLERBE, P.A. (FORMERLY LUCAS, BRYANT, DENNING & EDWARDS, P.A.), DEFENDANTS

No. COA06-357

(Filed 20 February 2007)

1. Attorneys— legal malpractice—last act giving rise to cause of action

Defendant law firm's filing of a dismissal with prejudice of plaintiffs' action against an insurance company to recover for a fire loss subsequent to plaintiffs' settlement with the insurance company did not extend the three-year statute of limitations for

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filing a legal malpractice action arising from that claim, because: (1) a malpractice action accrues from the date of the last act of defendant and not from the date when the attorney-client relationship either begins or ends; (2) only the last act by defendant attorney and his law firm that gives rise to the cause of action triggers the statute of limitations, and not any or all acts undertaken by him in his capacity as plaintiffs' attorney; (3) even if defendants had a continuing duty to represent plaintiffs beyond the settlement conference in this matter, the last act of defendant giving rise to the cause of action occurred no later than the time at which plaintiffs signed the release prepared by the insurance company and took possession of their settlement check on 1 June 2001, and thus, the 3 June 2004 filing of plaintiffs' complaint came more than three years after defendants' last act giving rise to the malpractice action; (4) the acts of mailing and filing the dismissal with prejudice were duties that defendant attorney and his partners performed as officers of the court to comply with the terms of the agreement previously signed by their clients; and (5) equitable estoppel is inapplicable when nothing in plaintiffs' brief nor in the record suggested that defendants prevented their filing this malpractice claim prior to the expiration of the three-year period.

2. Pleadings— denial of motion for sanctions

Plaintiff Bucks' outstanding motion for sanctions against the attorneys for defendant attorney and his law firm is denied.

Appeal by plaintiffs from order and judgment entered 15 August 2005 by Judge W. Russell Duke, Jr., in Superior Court, Pitt County. Heard in the Court of Appeals 12 December 2006.

Mills & Economos, L.L.P., by Larry C. Economos, for plaintiff-appellants.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Ronald C. Dilthey and Tobias S. Hampson, for defendant-appellants.

WYNN, Judge.

The three-year statute of limitations for a legal malpractice action begins to run "at the time of the occurrence of the last act of the defendant giving rise to the cause of action."¹ Here, plaintiffs contend the filing of the dismissal with prejudice constituted the "last act" to

1. N.C. Gen. Stat. § 1-15(c) (2005).

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give rise to their legal malpractice action. Because the final alleged act of malpractice occurred more than three years before the filing of the action, we affirm the trial court's ruling that the subsequent filing of the dismissal with prejudice did not extend the statute of limitations for filing the malpractice action.

In April 1997, a fire significantly damaged B&R Lanes, a bowling alley owned by Plaintiffs Cassie and Berley Buck through the company Ramboot, Inc. Two years later, on 12 April 1999, the Bucks retained Defendant Robert Lucas and his law firm Lucas, Bryant, Denning & Edwards, P.A. for the purpose of recovering monies owed to them under their commercial insurance policies as a result of the fire. Mr. Lucas and his firm filed an action on behalf of the Bucks against their insurance companies, seeking remaining damages under their policies insuring the bowling alley and property against loss from fire.

On 15 May 2001, the case went to mediation, with the insurance companies offering \$212,500.00 to the Bucks to settle their claims of loss, in addition to previous insurance payments totaling \$253,578.98. The Bucks agreed to the settlement offer, and that day signed a memorandum of settlement agreement for the \$212,500.00 balance in full release and satisfaction of all claims, including the filing of a voluntary dismissal of all their claims with prejudice. On 1 June 2001, the Bucks went to Mr. Lucas's law offices and signed the release prepared by the insurance company. The law firm mailed the release to the Clerk of Court for filing on 4 June 2001; the dismissal with prejudice was then filed on 6 June 2001.

According to the Bucks, Mr. Lucas and his partners informed them during the course of the 15 May mediation that they had no chance to get payments exceeding the \$212,500.00 offered by the insurance company. Specifically, the Bucks contend that Mr. Lucas stated that, because Ramboot, Inc. had been mistakenly dissolved, they were entitled to no insurance payments under law and would not be able to sustain a legal claim against the insurance company. The Bucks assert that Mr. Lucas told them that their only recourse to recoup the difference between what they should have been paid and what they were actually paid would be to sue their corporate attorney, who was responsible for the mistaken dissolution of Ramboot, Inc., for legal malpractice.

After signing the settlement agreement, the Bucks retained another attorney in Raleigh to represent them in a malpractice action

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against their former corporate attorney. Following his investigation, the Raleigh attorney informed the Bucks that Mr. Lucas and his firm had given them misinformation and bad advice as to the effect of Ramboot, Inc.'s dissolution on their insurance claims. Moreover, the Raleigh attorney offered his expert opinion that Mr. Lucas and his firm had in fact committed malpractice in their representation of the Bucks, namely, by breaching their duties to possess the requisite degree of learning, skill, and ability necessary to the practice of their profession, to exert their best judgment in the course of litigation, and to exercise reasonable and ordinary care in the use, skill, and application of their knowledge to the Bucks' case.

On 3 June 2004, the Bucks filed suit against Mr. Lucas and his firm for legal malpractice, alleging that they had failed to properly investigate and obtain reliable information as to the Bucks' claims, leading to an under-valuation of their damages, and that they had accordingly failed to provide proper advice, counsel, and information to the Bucks concerning their claim and their rights during the mediation. The Bucks claimed damages proximately caused by Mr. Lucas and his law firm in excess of one million dollars. Mr. Lucas and his law firm filed an answer on 23 July 2004, asserting a number of defenses, including that the applicable three-year statute of limitations barred the action.

On 7 July 2005, Mr. Lucas and his law firm filed a Rule 56 motion for summary judgment, arguing that there was no genuine issue of material fact in the case. The trial court granted the motion in an order filed 15 August 2005, which included undisputed findings of fact as to the 15 May 2001 settlement conference and agreement and concluded as a matter of law that the Bucks' suit was barred by the three-year statute of limitations for professional malpractice actions. The Bucks now appeal that order, arguing that the trial court erred by granting summary judgment in favor of Mr. Lucas and his law firm and in dismissing their complaint.

In North Carolina, "a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2005). The statute of limitations for such causes of action is generally three years, unless the loss or damage "originates under such circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin," such that it is "discovered by the claimant two or more years after the occurrence

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of the last act of the defendant giving rise to the cause of action," in which case "suit must be commenced within one year from the date discovery is made," and still no more than four years after the occurrence of the last act of the defendant. N.C. Gen. Stat. § 1-15(c); *Bolton v. Crone*, 162 N.C. App. 171, 589 S.E.2d 915 (2004). Thus, a plaintiff is given an additional year to file a malpractice claim if and only if the malpractice was of a nature that was not readily apparent, and the plaintiff did not actually discover the injury from the malpractice until two or more years after the last act of malpractice.

Here, the Bucks were informed for the first time in November or December 2001 by their Raleigh attorney of the alleged malpractice of Mr. Lucas and his firm. At most, this discovery of the alleged malpractice occurred seven months after an act of Mr. Lucas and his law firm that could have been the basis of the instant cause of action. Accordingly, the three-year statute of limitations for legal malpractice applies to the Bucks' claim.

[1] We turn now to the critical question of this case, namely, what action of Mr. Lucas and his law firm should be deemed the "last act of the defendant giving rise to the cause of action." The Bucks contend that the filing of the dismissal without prejudice, on 6 June 2001, constituted Mr. Lucas's last act of malpractice, as he had a continuing duty as their attorney up until that point to rescind a settlement agreement based on erroneous facts. However, the trial court found that the date that the written mediated settlement agreement was entered into, 15 May 2001, was the last act of Mr. Lucas and his firm giving rise to the Bucks' claim. Furthermore, the trial court noted that the cause of action "accrued no later than June 1, 2001, when the [Bucks] signed the formal release, and received and negotiated their portion of the settlement proceeds." The distinction is determinative of the outcome here, as the 3 June 2004 filing of the Bucks' complaint in the instant case falls within three years under their theory, but not under that of the trial judge.

We stress that the question is not whether an attorney-client relationship existed between the Bucks and Mr. Lucas and his firm; from the record, it clearly did. Indeed, the statute plainly states that a malpractice action accrues from the date of the "last act of the defendant," not from the date when the attorney-client relationship either begins or ends. *See Carlisle v. Keith*, 169 N.C. App. 674, 683-84, 614 S.E.2d 542, 548-49 (2005) (declining to extend the statute of limitations to accrue from continued representation following the alleged

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acts of malpractice); *Sharp v. Teague*, 113 N.C. App. 589, 596, 439 S.E.2d 792, 796 (1994) (“We cannot, therefore, equate the date of the attorney’s withdrawal of record with the date the attorney ceased representing the client with regard to the matters which are the basis of the malpractice action.”), *disc. review improvidently allowed*, 339 N.C. 730, 456 S.E.2d 771 (1995).

Moreover, only the last act by Mr. Lucas and his law firm that “giv[es] rise to the cause of action” triggers the statute of limitations, not any or all acts undertaken by him in his capacity as the Bucks’ attorney. *See Teague v. Eisenhower*, 157 N.C. App. 333, 338 n.2, 579 S.E.2d 600, 604 n.2 (finding that the statute of limitations began to accrue at the last alleged act of malpractice at the trial level, not by the discharge of the attorney following representation at the appellate level), *disc. review denied*, 357 N.C. 470, 587 S.E.2d 347 (2003). This determination as to the last act giving rise to an action for malpractice is a conclusion of law appropriate for the trial judge to make based on the facts presented, such as the dates of relevant events in the attorney-client relationship.²

Previously, our State Supreme Court has held that an attorney’s last act giving rise to a malpractice cause of action was the execution of his client’s will, and that he did not have a continuing duty to prepare a will properly reflecting the testator’s testamentary intent, such that the last act would have occurred immediately before the testator’s death. *Hargett v. Holland*, 337 N.C. 651, 654-56, 447 S.E.2d 784, 787-88, *reh’g denied*, 338 N.C. 672, 453 S.E.2d 177 (1994). The Court distinguished the situation in *Hargett* from that in *Sunbow Industries, Inc. v. London*, in which this Court found that “an attorney who represents a party [in the sale of certain assets] has a duty to file the financing statement after the transaction is closed, which duty continues so long as the filing of the financing statement would pro-

2. The Bucks argue in their brief that the trial court’s undisputed findings of fact two and three, which stated that the mediated settlement agreement was a binding and enforceable contract and that it was the last act of Mr. Lucas and his firm giving rise to the Bucks’ malpractice action, were in fact disputed. First, in reviewing this appeal as to the issue of statute of limitations, we need not determine whether the agreement was binding and enforceable. And second, the relevant dates in question—15 May 2001, 1 June 2001, 4 June 2001, 6 June 2001, and 3 June 2004—are not disputed and are supported by ample evidence and documentation in the record. The trial court’s determination that the last act of Mr. Lucas and his firm was either the entering into of the settlement agreement or the Bucks’ signing of the release was a conclusion of law, which we review *de novo*, as laid out in the course of this opinion. *See Hickory Orthopaedic Center, P.A. v. Nicks*, 179 N.C. App. 281, —, 633 S.E.2d 831, 834 (2006) (in a case tried before a judge without a jury, this Court’s “review of the trial court’s conclusions of law is *de novo*.”) (quotation omitted).

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tect some interest of his client." 58 N.C. App. 751, 753, 294 S.E.2d 409, 410, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 219 (1982). Thus, the statute of limitations for a malpractice action began running on the date of the filing of the bankruptcy petition, when the client's interest was harmed. *Id.* Nevertheless, the Court in *Hargett* specifically found that "it was the contractual arrangement between attorney and client that determined the extent of the attorney's duty to the client and the end of the attorney's professional obligation." 337 N.C. at 658, 447 S.E.2d at 789. Additionally, this Court has held that the drafting and delivery of deeds, not the subsequent refusal to correct errors in those deeds, constituted the "last acts" triggering the statute of limitations. *Jordan v. Crew*, 125 N.C. App. 712, 716-17, 482 S.E.2d 735, 737-38, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997).

According to the Bucks' initial complaint and their brief to this Court, they retained Mr. Lucas and his firm to represent them in their claim for insurance coverage loss related to the fire at their bowling alley. All of the allegations in the Bucks' original complaint refer to actions by Mr. Lucas and his partners either at or prior to the 15 May 2001 settlement conference. Even if we conclude that Mr. Lucas and his partners had a continuing duty to represent the Bucks beyond the settlement conference in this matter, we must hold that "the last act of the defendant giving rise to the cause of action" in the instant case occurred no later than the time at which the Bucks signed the release prepared by the insurance company and took possession of their settlement check on 1 June 2001. Thereafter, the acts of mailing and filing the dismissal with prejudice were duties that Mr. Lucas and his partners performed as officers of the court to comply with the terms of the agreement previously signed by their clients.

The 3 June 2004 filing of the Bucks' complaint therefore came more than three years after the last act by Mr. Lucas and his firm giving rise to the malpractice action. Thus, the action was barred by the applicable statute of limitations, and the trial court's order of summary judgment for Mr. Lucas and his law firm was proper.

Lastly, we find the Bucks' argument that Mr. Lucas and his law firm should be equitably estopped from asserting the statute of limitations as a defense to be without merit. "In order for equitable estoppel to bar application of the statute of limitations, a plaintiff must have been induced to delay filing of the action by the misrepresentations of the defendant." *Jordan*, 125 N.C. App. at 720, 482 S.E.2d at 739. The Bucks have alleged misconduct in the course of Mr. Lucas's

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legal representation of their insurance claims; nothing in their brief nor in the record suggests that Mr. Lucas prevented their filing this malpractice claim prior to the expiration of the three-year period. This assignment of error is therefore without merit.³

[2] As to the Bucks' outstanding motion for sanctions against the attorneys for Mr. Lucas and his law firm, that motion is hereby denied.

For the foregoing reasons, we affirm the trial court's order of summary judgment.

AFFIRMED.

Judges TYSON and STEELMAN concur.

IN THE MATTER OF: K.N.

No. COA06-1288

(Filed 20 February 2007)

Termination of Parental Rights— fundamental fairness—service—presence at hearing

A termination of parental rights was vacated where there were questions of fundamental fairness raised by issues concerning service and a hearing which lasted only twenty minutes at which no counsel was present for the mother. Her arrival in the courtroom after the completion of the hearing does not constitute a waiver of notice.

Appeal by respondent-mother from a judgment entered 23 June 2006, *nunc pro tunc* 26 May 2006, by Judge Gary S. Cash in District Court, Buncombe County. Heard in the Court of Appeals 17 January 2007.

3. The Bucks have included a considerable amount of argument in their brief to this Court as to the merits of their underlying malpractice claim and barring the affirmative defense of election of remedies. However, as clearly stated by the trial court, the order of summary judgment was based only on the issue of statute of limitations. In order for a question to have been properly preserved for appellate review, "the complaining party [must] obtain a ruling upon the party's request, objection or motion." N.C. R. App. P. 10(b)(1). Neither the merits of the Bucks' underlying claim nor the issue of election of remedies is properly before this Court; accordingly, those assignments of error are dismissed.

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Buncombe County Department of Social Services, by Danya Ledford Vanhook, for petitioner-appellee.

Michael N. Tousey, for guardian ad litem Sharon Bares.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for respondent-mother.

WYNN, Judge.

“When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures,”¹ which in North Carolina has been achieved in part through statutory provisions that ensure a parent’s right to counsel and right to adequate notice of such proceedings.² Here, we find that the proceedings below, culminating in the termination of Respondent-mother’s parental rights as to the minor child K.N., failed to provide the procedures necessary to ensure fairness to the rights of Respondent-mother. We, therefore, vacate the order of termination.

On 28 December 2004, the Buncombe County Department of Social Services (DSS) filed a petition alleging that the minor child, K.N., was an abused and neglected child due to the negative effects of Respondent-mother’s substance abuse. DSS assumed custody of K.N. by nonsecure custody order. On 18 March 2005, K.N. was adjudicated an abused and neglected child. On 18 October 2005, DSS filed a petition to terminate Respondent-mother’s parental rights, alleging Respondent-mother had neglected K.N. pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (2005).

A hearing was held on the petition to terminate Respondent-mother’s parental rights on 26 May 2006. At the call of the case, Respondent-mother was not present, although a local lawyer who was in the courtroom was allowed to withdraw as Respondent-mother’s attorney after telling the trial court that she had not heard from or had any response from Respondent-mother. Before the proceedings began, the DSS attorney stated his understanding that DSS had completed service on Respondent-mother but that no answer had been filed; the trial court also noted the lack of a responsive pleading or communication from Respondent-mother in the file.

The hearing then continued, consisting of the testimony of a single witness, the DSS case worker assigned to monitor K.N. The

1. *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L. Ed. 2d 599, 606 (1982).

2. See N.C. Gen. Stat. § 7B-1101.1 (2005); N.C. Gen. Stat. § 7B-1106 (2005).

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trial court concluded that grounds existed pursuant to N.C. Gen. Stat. § 1111(a)(1) to terminate Respondent-mother's parental rights, and that such termination was in K.N.'s best interest. A few moments after the conclusion of the approximately twenty-minute hearing, Respondent-mother entered the courtroom and learned that her parental rights had been terminated. She asked if she could appeal anything that day, and the trial court suggested she seek out the local lawyer who had earlier been allowed to withdraw from the hearing.

After Respondent-mother returned to the courtroom with the lawyer, the trial court clarified that the lawyer had not, in fact, been appointed as Respondent-mother's counsel for the termination hearing but had instead served only as her counsel in the underlying abuse and neglect adjudication proceeding. The trial court then reappointed the lawyer to serve as Respondent-mother's counsel and advise her as to the appeals process. He also asked Respondent-mother to provide the court with a valid address so she could receive a copy of the judgment when it was entered.

The judgment terminating Respondent-mother's parental rights as to K.N. was entered on 23 June 2006. She now appeals that judgment, arguing (I) the trial court erred in relieving Respondent-mother's attorney when the case was called for trial and then in conducting the trial when her attorney had just been discharged; (II) the trial court erred in conducting the hearing when Respondent-mother had not been properly noticed; and, (III) the trial court's judgment is void for lack of jurisdiction. Because we find the issue of notice to be determinative of the outcome in this case, we address only the second of these arguments, namely, that the record fails to show that Respondent-mother was properly noticed.

North Carolina General Statute § 7B-1106 provides that, "upon the filing of the [termination] petition, the court shall cause a summons to be issued. . . . [which] shall be directed to . . . [t]he parents of the juvenile . . . as provided under the procedures established by G.S. 1A-1, Rule 4(j)." That Rule outlines the proper procedures for service of process on individuals, including by delivering a copy of the summons to the individual herself, by leaving a copy with "some person of suitable age and discretion" residing at the individual's home, or by mailing a copy to the individual, using signature confirmation provided by the United States Postal Service. N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2005). Proof of service is then shown by an affidavit filed by the serving party, as well as the return or delivery receipt or signature confirmation, which "raises a presumption that the

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person who received the mail . . . was an agent of the addressee . . . or was a person of suitable age and discretion residing in the addressee's dwelling house." N.C. Gen. Stat. § 1A-1, Rule 4(j2) (2005).

Nevertheless, regardless of these technical requirements, a parent may waive the defenses of lack of personal jurisdiction or insufficiency of service of process by making a general appearance or by filing an answer, response, or motion without raising the defense. N.C. Gen. Stat. § 1A-1, Rule 12 (2005); *In re B.M.*, 168 N.C. App. 350, 355, 607 S.E.2d 698, 702 (2005) ("[A] party who is entitled to notice of a hearing waives that notice by attending the hearing of the motion and participating in it without objecting to lack thereof."); *In re J.W.J.*, 165 N.C. App. 696, 698-99, 599 S.E.2d 101, 102-03 (2004).

Here, Respondent-mother did not participate in this case in any meaningful way; indeed, her arrival at the courtroom after the conclusion of the hearing does not constitute a waiver of notice. Because the hearing had been completed, her failure to object to lack of notice or to raise the issue at that time has no bearing on the substance of her claims. We therefore turn to the question of whether Respondent-mother received proper notice of the termination proceedings.

The record before us shows that DSS mailed a summons to Respondent-mother at a post office box in Leicester, North Carolina, on 18 October 2005, notifying her about the petition to terminate her parental rights. However, the summons contains no information as to how DSS ensured that Respondent-mother received it. The record contains an additional summons, dated 27 October 2005, with a different address for Respondent-mother in Marshall, North Carolina, but again, there is no indication of how service was made. According to the trial court and DSS, Respondent-mother filed no answer or responsive pleading to either summons about the petition.

On 3 November 2005, DSS filed an affidavit of service, swearing that a copy of the summons and petition had been sent certified mail, return receipt requested, to Respondent-mother at the same Marshall, North Carolina address on 1 November 2005. A copy of the certified mail receipt was attached, signed by an individual named Hershel Jenkins. This name appears nowhere else in the record. DSS also provided certificates of service of notice of the first termination hearing, scheduled for 22 February 2006 and then postponed, and the one at issue in this case, scheduled for "the trial term of May 22nd, 2006." Both of these contained the Marshall, North Carolina address for Respondent-mother; additionally, both state that service was made by

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mailing a copy of the summons to “the attorney or attorneys for said parties.” The specific date and time of the 26 May 2006 hearing was not included in that notice, but the DSS social worker testified at the hearing that she had spoken to Respondent-mother’s brother and left a message with him for Respondent-mother as to when the hearing was scheduled.

In its brief to this Court, DSS contends that Respondent-mother’s appearance at the hearing, albeit after its conclusion, shows that she had notice of its time and date and was simply tardy. We are not persuaded. Respondent-mother arrived after the conclusion of the hearing; the length of time after its conclusion is immaterial. Although true that the affidavit of service and signed return receipt of 1 November 2005 “raises a presumption that the person who received the mail . . . was an agent of the addressee . . . or was a person of suitable age and discretion residing in the addressee’s dwelling house,” N.C. Gen. Stat. § 1A-1, Rule 4(j2), we point in particular to the final phrase of this provision, namely, “residing in the addressee’s dwelling house.”

There is no evidence that the Marshall address where Hershel Jenkins signed for the summons was indeed Respondent-mother’s dwelling house or that she had ever responded to any mail sent there. Indeed, when asked to provide her address to the trial court, she gave an address entirely different than that which DSS had been using for service of process. Moreover, according to the record, the two notices of the scheduled termination hearings were purportedly mailed to Respondent-mother’s attorney, when the trial court stated on the record that, as of the hearing date, no attorney had in fact been appointed for her for the termination proceedings.

This Court has previously held that

[A] defendant who seeks to rebut the presumption of regular service generally must present evidence that service of process failed to accomplish its goal of providing defendant with notice of the suit, rather than simply questioning the identity, role, or authority of the person who signed for delivery of the summons.

Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 493, 586 S.E.2d 791, 797 (2003). We find that the discrepancy between the address used by DSS and that given by Respondent-mother to the trial court, as well as Respondent-mother’s failure to appear or respond in any way in the

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termination proceedings, serves to rebut the presumption of valid service, which is further weakened by the lack of information or evidence as to the identity of Hershel Jenkins. *Cf. In Re Estate of Cox*, 36 N.C. App. 582, 585, 244 S.E.2d 733, 735 (1978) (finding valid service when the mail was addressed to the defendant “in care of” the individual who signed the return receipt).

We note too the unique procedural posture of this case, in light of Respondent-mother’s appearance in the courtroom after the conclusion of the hearing. Although this Court has previously found that a return receipt and a respondent’s filed petition showed sufficient compliance to raise a rebuttable presumption of valid service, *see In re Williams*, 149 N.C. App. 951, 959, 563 S.E.2d 202, 206 (2002), nothing was filed by Respondent-mother in this case. Moreover, we held in *Williams* that the respondent had failed to rebut the presumption because he had not shown that he never received the summons and complaint. Here, however, because the hearing had already concluded by the time Respondent-mother arrived, she had no opportunity to present evidence or argument that she had not received the summons or petition. She has done so in her appeal, however, which was her first opportunity to argue lack of service of process.

We are reminded of the United States Supreme Court’s caution that

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753-54, 71 L. Ed. 2d 599, 606 (1982); *see also In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397-98, *aff’d per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992).

In sum, we hold that the issues as to valid service, as well as a hearing lasting only twenty minutes with no counsel present for Respondent-mother, raise questions as to the fundamental fairness of the procedures that led to the termination of Respondent-mother’s parental rights. Accordingly, we vacate the order of termination.

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Vacated.

Chief Judge MARTIN and Judge McGEE concur.

A. MARK ESPOSITO, PLAINTIFF v. TALBERT & BRIGHT, INC. AND
JOHN T. TALBERT, III, DEFENDANTS

No. COA06-572

(Filed 20 February 2007)

1. Wrongful Interference— tortious interference with contract—employment—no evidence that termination sought by defendants

The trial court did not err by granting defendants summary judgment on a claim for tortious interference with contract arising from the dismissal of plaintiff from his employment with NCDOT. Taking all of plaintiff's evidence as true and drawing all inferences in his favor, plaintiff did not produce evidence that defendants sought the termination.

2. Unfair Trade Practices— termination of employment—commerce not affected

The trial court did not err by granting defendants summary judgment on a claim for unfair and deceptive trade practices arising from the termination of plaintiff's employment where there was no forecast of evidence that defendants' statements had any impact beyond the employment relationship. Plaintiff did not show that defendants' statements and actions were in or affecting commerce.

3. Conspiracy— civil—no separate claim

There is no separate claim for civil conspiracy in North Carolina (although such a claim may associate the defendants for evidentiary purposes), and summary judgment was properly granted for defendants on a civil conspiracy claim where it was also properly granted on the underlying claims.

Appeal by plaintiff from order dated 22 November 2005 by Judge Ronald L. Stephens in Wake County Superior Court. Heard in the Court of Appeals 10 January 2007.

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[181 N.C. App. 742 (2007)]

Bailey & Dixon, LLP, by J. Heydt Philbeck, for plaintiff-appellant.

Jackson, Mills & Carter, P.A., by F. Darryl Mills, for defendant-appellees.

BRYANT, Judge.

A. Mark Esposito (plaintiff) appeals from an order dated 22 November 2005 granting summary judgment in favor of Talbert & Bright, Inc., and John T. Talbert, III (defendants) as to all of plaintiff's claims. For the reasons below, we affirm the order of the trial court.

Facts

From 1983 until 12 June 2000, plaintiff was employed by the North Carolina Department of Transportation (NCDOT), Division of Aviation. Plaintiff was NCDOT's project manager for a runway expansion project (the Project) involving the Brunswick County Airport in Brunswick County, North Carolina. At the time plaintiff was managing the Project, his immediate supervisor was Richard Barkes, the Airport Development Manager. The Aviation Director, William Williams, was Barkes' immediate supervisor, and Deputy Secretary David King was Williams' immediate supervisor. Talbert & Bright, Inc. is an engineering firm which provides consulting engineering services and was hired by the Brunswick County Airport Authority to be the consulting engineer for the Project. John T. Talbert, III was an officer and director of Talbert & Bright, Inc.

On 3 April 2000 a meeting occurred between, among others, Williams and Talbert. At this meeting the attendees discussed communication and personnel concerns relating to the Project, including several complaints concerning plaintiff's role in the project and possible ethical violations by plaintiff.

On 12 May 2000, Williams initiated disciplinary action against plaintiff by placing him on administrative leave. Subsequently, Williams terminated plaintiff's employment with NCDOT. Plaintiff challenged his employment termination pursuant to the State Personnel Act, and the Office of Administrative Hearings subsequently overturned plaintiff's termination finding he was terminated without just cause. Plaintiff has been reinstated to a job with NCDOT, but it is outside of his career field.

IN THE COURT OF APPEALS

ESPOSITO v. TALBERT & BRIGHT, INC.

[181 N.C. App. 742 (2007)]

Procedural History

On 8 October 2004, plaintiff filed suit against defendants, alleging claims for tortious interference with contract, unfair and deceptive trade practices, and civil conspiracy. Defendants filed their answer in this case on 7 December 2004. On 18 July 2005, defendants filed a motion for summary judgment, which was granted by the trial court by Order dated 22 November 2005. Plaintiff appeals.

Plaintiff argues the trial court erred in granting summary judgment in favor of defendants on his claims of tortious interference with contract, unfair and deceptive trade practices, and civil conspiracy. We disagree.

Standard of Review

Under Rule 56(c) of the North Carolina Rules of Civil Procedure, summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). “The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.” *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005) (citing *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982)). The moving party may meet its burden “by proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citation omitted).

Once the moving party meets its burden, the nonmovant, in order to survive the summary judgment motion, must “produce a forecast of evidence demonstrating that the [nonmovant] will be able to make out at least a *prima facie* case at trial.” *Id.* at 66, 376 S.E.2d at 427 (citation omitted). The nonmovant “may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial.” N.C. Gen. Stat. § 1A-1, Rule 56(e) (2005). However, “[a]ll facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party.” *Dobson v. Harris*,

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352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). On appeal, this Court reviews an order granting summary judgment *de novo*. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

Tortious Interference with Contract

[1] Plaintiff first argues the trial court erred in granting defendants summary judgment as to his claim of tortious interference with his contract for employment with NCDOT. To establish a claim for tortious interference with contract, plaintiff must show:

“(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.”

Beck v. City of Durham, 154 N.C. App. 221, 232, 573 S.E.2d 183, 191 (2002) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)). “A plaintiff may maintain a claim for tortious interference with contract even if the employment contract is terminable at will.” *Bloch v. Paul Revere Life Ins. Co.*, 143 N.C. App. 228, 239, 547 S.E.2d 51, 59 (2001) (citation omitted).

Here, defendants produced evidence challenging plaintiff’s ability to establish that they intentionally induced NCDOT to terminate the employment of plaintiff. Plaintiff’s attempts at forecasting evidence supporting this element of his claim fall short of meeting his required burden. Even taking all of plaintiff’s evidence as true, and drawing all inferences in his favor, plaintiff’s forecast of evidence does not show defendants intentionally *induced* NCDOT to terminate plaintiff’s employment. Defendants’ allegations and problems with plaintiff were but one of six instances of unacceptable conduct upon which NCDOT based the termination of plaintiff’s employment. Plaintiff has not produced any evidence indicating defendants actually sought the termination of plaintiff’s employment with NCDOT. Further, given the sworn affidavits of Williams, Barkes, and King, all stating that defendants did not induce the termination of plaintiff’s employment, any inference drawn from defendants’ statements and conduct suggesting otherwise is too tenuous to defeat summary judgment. *See White v. Cross Sales & Eng’g Co.*, 177 N.C. App. 765, 770, 629 S.E.2d 898, 901 (2006) (upholding summary judgment in favor of the defendant where the plaintiff relied “only on an allegation, with no proof,” that the

third party intentionally induced her firing). Therefore, plaintiff has failed to forecast evidence demonstrating he will be able to make out at least a *prima facie* case at trial and the trial court did not err in granting summary judgment for defendants as to plaintiff's claim for tortious interference with contract.

Unfair and Deceptive Trade Practices

[2] Plaintiff next argues the trial court erred in granting defendants summary judgment as to his claim of unfair and deceptive trade practices. "To prevail on a claim of unfair and deceptive trade practices, a plaintiff must show: (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) that plaintiff was injured thereby." *Strickland v. Lawrence*, 176 N.C. App. 656, 665, 627 S.E.2d 301, 307 (2006) (citation and quotations omitted); *see also* N.C. Gen. Stat. § 75-1.1 (2005) (declaring unfair or deceptive acts or practices in or affecting commerce unlawful). This Court has further held that:

The primary purpose of G.S. § 75-1.1 is to provide a private cause of action for consumers. Although commerce is defined broadly under G.S. § 75-1.1(b) as all business activities, however denominated, the fundamental purpose of G.S. § 75-1.1 is to protect the consuming public. Typically, claims under G.S. § 75-1.1 involve [a] buyer and seller. Thus, the statute usually is not applicable to employment disputes. Nonetheless, the mere existence of an employer-employee relationship does not in and of itself serve to exclude a party from pursuing an unfair trade or practice claim. The proper inquiry is not whether a contractual relationship existed between the parties, but rather whether the defendants' allegedly deceptive acts *affected* commerce. What is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace.

Durling v. King, 146 N.C. App. 483, 488-89, 554 S.E.2d 1, 4 (2001) (internal citations and quotations omitted).

Here, as in Issue I, *supra*, plaintiff's claim is based upon defendants' statements and actions to plaintiff's supervisors. Assuming *arguendo* that defendants' statements and actions were unfair or deceptive acts or practices that injured plaintiff, plaintiff has forecast no evidence that defendants' statements and actions had any impact beyond his employment relationship with NCDOT. Therefore plaintiff has failed to show defendants' statements and actions were "in or affecting commerce" and the trial court did not err in granting sum-

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mary judgment for defendants as to plaintiff's claim for unfair and deceptive trade practices.

Civil Conspiracy

[3] Plaintiff lastly argues the trial court erred in granting defendants summary judgment as to his claim of civil conspiracy. It is well established that "there is not a separate civil action for civil conspiracy in North Carolina." *Dove v. Harvey*, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (citing *Shope v. Boyer*, 268 N.C. 401, 150 S.E.2d 771 (1966)), *disc. rev. denied*, 360 N.C. 289, 628 S.E.2d 249 (2006). "The charge of conspiracy itself does nothing more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all." *Id.* (citation and quotations omitted).

Plaintiff argues that civil conspiracy should attach to defendants for their statements and actions which underlie plaintiff's claims for tortious interference with contract and unfair and deceptive trade practices. As we have held that summary judgment for defendants on these claims was proper, plaintiff's claim for civil conspiracy must also fall. Therefore, the trial court did not err in granting summary judgment for defendants as to plaintiff's claim for civil conspiracy.

Affirmed.

Judges McGEE and ELMORE concur.

FREDDY L. HAYES, ADMINISTRATOR OF THE ESTATE OF INA HAYES, PLAINTIFF v. PREMIER LIVING, INC., PREMIER LIVING AND REHAB, LLC, DOVE HEALTHCARE, LLC, CHAN VON HENNER, KEVIN PENNINGTON, ALLENE VON HENNER, AND E. AUTRY DAWSON, SR., DEFENDANTS

No. COA06-661

(Filed 20 February 2007)

1. Appeal and Error— appealability—interlocutory order— substantial right

An order granting plaintiff's motion to compel discovery and denying defendants' motion for a protective order affects a substantial right and is immediately appealable because: (1) an

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interlocutory discovery order affects a substantial right when a party asserts a statutory privilege which directly relates to the matter to be disclosed under the order, and the assertion of such privilege is not otherwise frivolous or insubstantial; and (2) the pertinent interlocutory discovery order compels production of reports that may be privileged under N.C.G.S. §§ 90-21.22A and 131E-107.

2. Discovery— incident reports—motion to compel production—peer review privilege

The trial court did not abuse its discretion in a wrongful death action arising from alleged nursing home neglect by granting plaintiff's motion to compel production of the three disputed incident reports and by denying defendants' motion for a protective order pursuant to the peer review privilege set forth under N.C.G.S. §§ 90-21.22A and 131E-107, because: (1) defendants failed to show that the reports were part of the proceedings of defendants' quality assurance committee; (2) the incident reports were produced by the nurse who responded to each unusual occurrence, and no nurse who produced a report was a member of a quality assurance team; (3) there was no evidence to show the team actually considered the reports, and the team typically did not review the reports; (4) N.C.G.S. § 131E-107 protects only those records which were actually a part of the team's proceedings, produced by the team, or considered by the team; (5) the title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an otherwise available document from discovery merely by having it presented to or considered by a quality review committee; and (6) the statutory privilege codified by the General Assembly to protect the public interest of balancing the goal of medical staff candor against the cost of impairing plaintiffs' access to evidence extends only to three limited classes of documents, none of which are present in the instant case.

Appeal pursuant to N.C. Gen. Stat. § 7A-27(d) from the order granting plaintiff's motion to compel and denying defendants' motion for a protective order, entered 12 January 2006 by Judge Ola M. Lewis in Superior Court, Columbus County. Heard in the Court of Appeals 10 January 2007.

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Yates, McLamb & Weyher, L.L.P., by Michael C. Hurley and Christopher M. West, for defendant-appellants.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim, for plaintiff-appellee.

STROUD, Judge.

This is a wrongful death action arising from alleged nursing home neglect. Plaintiff is the administrator of the estate of the deceased, Ina Hayes, and is also Ms. Hayes' son. Defendants are the owners and operators of Premier Living & Rehabilitation Center (Premier Living) where Ms. Hayes resided.

Defendants appeal the trial court order granting plaintiff's motion to compel production of three incident reports prepared by Premier Living staff and denying defendants' motion for a protective order pursuant to the peer review privilege set forth in N.C. Gen. Stat. §§ 90-21.22A and 131E-107. This Court must now determine whether the trial court abused its discretion by concluding that the incident reports are not privileged. Because defendants failed to show that the reports were part of the proceedings of Premier Living's quality assurance committee, or were considered or produced by Premier Living's quality assurance committee, we hold that the trial court did not abuse its discretion by granting plaintiff's motion to compel.

Plaintiff's complaint alleges that defendants were negligent in their care of Ms. Hayes and that defendants' negligence caused Ms. Hayes to fracture her hip and eventually resulted in her death. During discovery, plaintiff sought production of incident reports documenting several falls by Ms. Hayes at Premier Living. Although defendants identified three such reports, defendants refused to produce the reports on the basis that they are protected by the peer review privilege. On 1 December 2005, plaintiff filed a motion to compel production of the incident reports. Defendants filed a motion for a protective order on 5 January 2006.

Incident reports are prepared by Premier Living nursing staff following "unusual occurrences" and document the factual circumstances surrounding each occurrence, including a description of the incident, possible causes, and resulting injuries. In this case, defendant identified three incident reports involving Ms. Hayes during the relevant time period. The disputed incident reports were completed on 10 January 2002, 9 August 2002, and 19 August 2002.

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In support of their motion for a protective order, defendants presented the affidavit of Linda Parnell, the administrator of Premier Living. In her affidavit, Ms. Parnell stated that Premier Living employs a “Continuous Quality Improvement Team” (CQI Team), which is a committee of administrators and health care providers who assess the quality of care provided to its residents. During the time Ms. Hayes resided at Premier Living, the CQI team met quarterly. Ms. Parnell also stated that the purpose of preparing incident reports is “to maintain and improve the quality of care of residents at the facility.” However, during her deposition, Ms. Parnell explained that individual incident reports are “not typically” discussed at CQI Team meetings; rather, the team discusses “trends.” The nurses who prepare incident reports are not members of the CQI Team.

On 9 January 2006, the trial court heard arguments on plaintiff’s motion to compel and defendants’ motion for a protective order, during which the court reviewed the disputed incident reports *in camera*. Thereafter, the court ruled that the incident reports are discoverable, entering a written order on 12 January 2006. In its order, the trial court found that “[d]efendants failed to produce any evidence that the incident reports (1) were part of the proceedings of its medical review committee, (2) were records and materials produced by its medical review committee, or (3) were considered by its medical review committee.” Defendants appealed, arguing that the incident reports are privileged because “the purpose behind the preparation of the documents was for peer review.”

[1] “Interlocutory orders and judgments are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy.” *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). Most discovery orders are interlocutory. *See Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003).

“Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Sharpe v. Worland*, 315 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). However, interlocutory orders are immediately appealable if “delaying the appeal will irreparably impair a substantial right of the party.” *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). An interlocutory discovery order affects a substantial right when “a party asserts a statutory privilege which directly relates to the matter to be disclosed under [the order], and the assertion of such privilege is not

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otherwise frivolous or insubstantial." *Sharpe*, 351 N.C. at 166, 522 S.E.2d at 581. Here, the interlocutory discovery order compels production of reports that may be privileged pursuant to N.C. Gen. Stat. §§ 90-21.22A and 131E-107. Thus, the order affects a "substantial right" and is immediately appealable to this Court.

[2] N.C. Gen. Stat. §§ 90-21.22A and 131E-107 restrict discovery of certain materials in civil actions against providers of health care services and nursing homes respectively. Premier Living's facility in which Ms. Hayes resided is a "nursing home" as defined by N.C. Gen. Stat. § 131E-101(6). Specifically, N.C. Gen. Stat. § 131E-107 provides that "[t]he *proceedings* of a quality assurance, medical, or peer review committee, the *records and materials it produces* and the *materials it considers* shall be confidential and not considered public records . . . and shall not be subject to discovery or introduction into evidence" in these actions. (Emphasis added.)¹ The protection set forth in these sections is commonly known as the peer review privilege.

The peer review privilege is "designed to encourage candor and objectivity in the *internal workings* of medical review committees." *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83, 347 S.E.2d 824, 829 (1986) (emphasis added). Whether a document is protected by the peer review privilege is determined at the time of the trial court order, *see Windman v. Britthaven, Inc.*, 173 N.C. App. 630, 633, 619 S.E.2d 522, 524 (2005) (holding that materials produced by a nursing home review committee were not privileged because N.C. Gen. Stat. § 131E-107 was not in effect at the time the trial court filed its order compelling discovery), and the party asserting the privilege bears the burden of proof, *cf. Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (stating that "[t]he party seeking either attorney-client privilege or work-product privilege bears the burden of proof").

"Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schs. Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. rev. denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). "To demonstrate an

1. Although the trial court referred to the CQI Team as a "medical review" committee in its order, it appears that the CQI Team is actually a "quality assurance" committee as defined by N.C. Gen. Stat. § 131E-101(8). However, for both types of committee, certain documents relating to the team are potentially protected by N.C. Gen. Stat. § 131E.

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abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (internal citation omitted), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006).

Here, defendants did not present any evidence tending to show that the disputed incident reports were (1) part of the CQI team's *proceedings*, (2) *produced* by the CQI team, or (3) *considered* by the CQI team as required by N.C. Gen. Stat. § 131E-107. The incident reports were produced by the nurse who responded to each "unusual occurrence" and no nurse who produced a report was a member of the CQI Team. Although Ms. Parnell's affidavit describes the existence and mission of the CQI Team, and Ms. Parnell generally states that incident reports are intended to "improve the quality of care" received by Premier Living residents, there is no evidence to show the team actually considered the reports. In fact, Premier Living's CQI team did "not typically" review the incident reports.

We do not agree with defendants that N.C. Gen. Stat. § 131E-107 protects any and all records which may be *subject to* consideration by the CQI team; rather, we conclude that the plain language of section 131E-107 protects only those records which were *actually* a part of the team's proceedings, produced by the team, or considered by the team. We emphasize that these are substantive, not formal, requirements.² Thus, in order to determine whether the peer review privilege applies, a court must consider the circumstances surrounding the actual preparation and use of the disputed documents involved in each particular case. The title, description, or stated purpose attached to a document by its creator is not dispositive, nor can a party shield an *otherwise available* document from discovery merely by having it presented to or considered by a quality review committee. See N.C. Gen. Stat. § 131E-107 (2005).

Defendants stress that the purpose of the peer review privilege is to "protect from discovery and introduction into evidence medical review committee proceedings and related materials because of the fear that external access to peer investigations conducted by staff

2. We further emphasize that N.C. Gen. Stat. § 131E-107 also provides that "information, documents, or records otherwise available are not immune from discovery or use in a civil action merely because they were presented during proceedings of the committee. Documents otherwise available as public records within the meaning of G.S. 132-1 do not lose their status as public records merely because they were presented or considered during proceedings of the committee."

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committees stifles candor and inhibits objectivity.” *Shelton*, 318 N.C. at 82, 347 S.E.2d at 828 (internal quotation omitted). We agree that, through section 131E-107, the General Assembly has balanced the “goal of medical staff candor” against the “cost of impairing plaintiffs’ access to evidence.” *Id.* (internal quotation omitted). However, the statutory privilege codified by the General Assembly to protect this public interest extends only to three limited classes of documents, none of which are present in the case *sub judice*.

For the reasons stated above, we hold that the trial court did not abuse its discretion by granting plaintiff’s motion to compel production of the three disputed incident reports and denying defendants’ motion for a protective order. Defendants’ assertion that the CQI team could have reviewed the incident reports and may do so in the future is insufficient to show that the reports are material that is privileged by N.C. Gen. Stat. §§ 90-21.22A and 131E-107. The trial court’s order is affirmed.

AFFIRMED.

Judges TYSON and STEPHENS concur.

SUZANNE PAIGE KESSLER, PLAINTIFF v. DAVID SCOTT SHIMP, GRADUATE LAKE NORMAN, INC., CHARLOTTE RESTAURANT CREATIONS, LLC, FIREFLY FIVE, INC., AND MICHAEL TERENCE LEON LASCHINSKI, DEFENDANTS, AND ERIE INSURANCE EXCHANGE, UNNAMED DEFENDANT

No. COA06-736

(Filed 20 February 2007)

Insurance—automobile—setoff—medical payments from UIM coverage—express terms of policy

The trial court correctly granted summary judgment for defendant automobile insurer in an automobile accident case where plaintiff argued that the amount paid to plaintiff under the medical payments part of the insurance policy was improperly set off from the amount due under the UIM portion of the policy. Defendant acted properly under the express terms of the policy.

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Appeal by plaintiff from order entered 15 March 2006 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2007.

Katherine Freeman and Klein & Freeman, PLLC, by Paul I. Klein, for plaintiff-appellant.

No brief filed for defendants-appellees David Scott Shimp, Graduate Lake Norman, Inc., Charlotte Restaurant Creations, LLC, Firefly Five, Inc., and Michael Terrence Leon Laschinski.

Dean & Gibson L.L.P., by Thomas G. Nance, for unnamed defendant-appellee.

TYSON, Judge.

Suzanne Paige Kessler (“plaintiff”) appeals from order entered granting summary judgment in favor of unnamed defendant Erie Insurance Exchange (“defendant”) and denying plaintiff’s motion for summary judgment. We affirm.

I. Background

On 4 April 2004, plaintiff suffered severe bodily injuries during an automobile accident allegedly caused by defendant David Scott Shimp. Plaintiff’s passengers, Anna Grace Jordan and Sally Mackenzie Clark, were killed in the accident. At the time of the accident, plaintiff was operating her grandfather’s, Francis Edward Allen (“Allen”), automobile. Defendant insured Allen’s vehicle. Defendant’s policy provided \$100,000.00 per injured person in underinsured motorists’ (“UIM”) coverage and \$2,000.00 per injured person in medical payments coverage. Defendant David Scott Shimp was insured by State Farm Mutual Insurance Company (“State Farm”). State Farm provided liability coverage of \$30,000.00 per injured person, or \$60,000.00 in the aggregate.

It is undisputed that: (1) defendant’s insurance policy covered plaintiff; (2) defendant’s policy provided UIM coverage in the amount of \$100,000.00 per injured person and medical payments coverage in the amount of \$2,000.00 per injured person; (3) State Farm paid plaintiff \$20,000.00; (4) defendant is entitled to reduce its UIM limit of liability by \$20,000.00, the amount paid by State Farm, to \$80,000.00; and (5) defendant has paid plaintiff \$78,000.00 under the UIM portion of its policy and \$2,000.00 under the medical payments portion of its policy.

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On 12 October 2005, plaintiff filed suit claiming she was owed an additional \$2,000.00 of UIM coverage and for attorney's fees pursuant to N.C. Gen. Stat. § 6-21.1. On 20 December 2005, defendant moved for summary judgment and asserted:

[T]he total amount of [UIM] benefits available to the Plaintiff in this case is \$78,000.00, after a reduction for applicable liability insurance limits and a reduction for payments made to Plaintiff under the medical payments coverage portion of [defendant's] insurance policy. [Defendant] contends that as a matter of law, it has tendered all available [UIM] proceeds to the Plaintiff and is not obligated to provide any additional coverage or monies to Plaintiff.

On 17 January 2006, plaintiff cross-motioned for summary judgment. Plaintiff asserted she was entitled as a matter of law to the limits of the UIM policy or \$80,000.00 in addition to the \$2,000.00 medical payments.

On 15 March 2006, the trial court granted defendant's motion for summary judgment and denied plaintiff's motion for summary judgment. Plaintiff appeals.

II. Issues

Plaintiff argues the trial court erred by granting defendant's motion for summary judgment and denying her motion for summary judgment.

III. Standard of Review

Our Supreme Court has stated:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [a] party is entitled to a judgment as a matter of law. On appeal of a trial court's allowance of a motion for summary judgment, we consider whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. Evidence presented by the parties is viewed in the light most favorable to the non-movant.

Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (internal quotations and citation omitted).

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Here, “[t]he parties conceded there is no question of material fact by submitting cross-motions for summary judgment.” *Erie Ins. Exch. v. St. Stephen’s Episcopal Church*, 153 N.C. App. 709, 711, 570 S.E.2d 763, 765 (2002). The question before us is whether either party is entitled to judgment as a matter of law. *See id.* at 716, 570 S.E.2d at 768 (reversing the trial court’s order that granted summary judgment for the defendant and remanding for entry of an order granting summary judgment for the plaintiff).

IV. Summary Judgment

Plaintiff asserts the trial court erred in construing defendant’s insurance policy. Plaintiff argues summary judgment in favor of defendant was error because: (1) there was no potential duplication of payment because her damages exceeded all coverages available and (2) the language of the insurance contract is vague and must be construed against defendant and in favor of coverage. Plaintiff argues summary judgment in favor of defendant should be reversed and the case remanded for entry of summary judgment in favor of plaintiff. We disagree.

The construction and interpretation of provisions in an insurance contract is a question of law. *See Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 123, 633 S.E.2d 113, 115 (2006) (“Contract interpretation is a matter of law, and the standard of review for this Court is *de novo*.”) (internal citation omitted).

Our Supreme Court has stated:

[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto. . . .

[T]he intention of the parties controls any interpretation or construction of the contract, and intention must be derived from the language employed. *This Court has long recognized its duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used. The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract.* Only when the contract is ambiguous does strict construction become inappropriate.

Fidelity Bankers Life Ins. Co. v. Dortch, 318 N.C. 378, 380-81, 348 S.E.2d 794, 796 (1986) (internal citations omitted) (emphasis supplied).

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This Court stated:

When reviewing an insurance policy, this Court must examine the contract as a whole and effectuate the intent of the parties. Any question as to the meaning of the language used in a policy is a question of law for the court to resolve.

Because the intention of the parties is paramount, the court must use definitions contained in the policy to determine the meaning of words or phrases detailing the scope of coverage. In the absence of policy definitions, the court must define a term or phrase consistent with the context in which it is used and the meaning accorded it in ordinary speech. In doing so, courts are encouraged to use standard, nonlegal dictionaries as a guide.

Any ambiguities, however, as to the definition of policy terms or the scope of coverage are to be resolved in favor of coverage. This is because the insurance company prepared the policy and chose the language contained therein. An ambiguity exists when the language used in the policy is susceptible to different, and perhaps conflicting, interpretations. However, the aforementioned rules of construction cannot be used to rewrite an unambiguous policy[.]

McLeod v. Nationwide Mutual Ins. Co., 115 N.C. App. 283, 289-90, 444 S.E.2d 487, 491-92 (internal citations and quotations omitted), *disc. rev. denied*, 337 N.C. 694, 448 S.E.2d 528 (1994).

Plaintiff concedes: (1) the medical payments coverage is not statutorily mandated; (2) the medical payments coverage is not discussed in N.C. Gen. Stat. § 20-279.1, *et seq.*, the Financial Responsibility Act; and (3) in the absence of an applicable provision in the Financial Responsibility Act, an insurer's liability is measured by the terms of the policy as written.

Plaintiff argues defendant improperly set off from the amount due to her under the UIM portion of the insurance contract the \$2,000.00 previously paid to plaintiff under the Part B medical payments portion of its policy. We disagree.

Part C2 of the insurance contract at issue here sets forth the terms and limits of UIM coverage provided to plaintiff. The policy expressly provides in the limit of liability subsection to part C2: "This coverage is excess over and *shall not duplicate* any amount paid or payable under Part B." (emphasis supplied). Part B of the policy is

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titled Medical Payments Coverage and sets forth the terms of medical payments coverage.

After subtracting State Farm's payment, it is undisputed that defendants' limit of UIM liability to plaintiff is \$80,000.00. Defendant paid plaintiff \$78,000.00 under the UIM portion of its policy after crediting and setting off \$2,000.00 defendant had previously paid to plaintiff under the Part B medical payments portion of its policy. Pursuant to the express terms of the insurance policy that covered defendant's UIM liability to plaintiff, defendant properly took credit and setoff for the \$2,000.00 it had previously paid to plaintiff under the medical payments portion of its policy. *See Espino v. Allstate Indem. Co.*, 159 N.C. App. 686, 690, 583 S.E.2d 376, 379 (2003) (Where the express language in the plaintiff's insurance policy stated that UM coverage was "in excess of and shall not duplicate payments made under the medical payments coverage," the defendant was entitled to a credit and setoff for the \$1,000.00 it previously paid the plaintiff in medical expenses.). This assignment of error is overruled.

V. Conclusion

Pursuant to the express terms of defendant's insurance policy, defendant properly credited and setoff the \$2,000.00 it had previously paid to plaintiff under the medical payments portion of its policy against the \$80,000.00 due plaintiff for UIM coverage. *Espino*, 159 N.C. App. at 690, 583 S.E.2d at 379. Defendant satisfied all of its coverage obligations under the insurance policy to plaintiff. Defendant was entitled to judgment as a matter of law. The trial court's order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment is affirmed.

Affirmed.

Judges STEPHENS and STROUD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 20 FEBRUARY 2007

BAYLER v. BAYLER No. 06-261	Guilford (02CVD1937)	Affirmed in part, remanded in part
D.A.N. JOINT VENTURE III, LTD. P'SHIP v. FENNER No. 06-628	Dare (02CVS187)	Reversed and remanded
IN RE A.J. Y.-E. No. 06-568	Mecklenburg (05J446)	Affirmed in part; remanded in part
IN RE A.N.J., A.J.T.J., R.J.M., E.J.M. No. 06-985	New Hanover (03J483-86)	Affirmed
IN RE B.D. No. 06-1140	Gaston (95J316)	Affirmed
IN RE C.D.L-H., C.L.O.L.-H. No. 06-1262	Guilford (03J412) (05J81)	Affirmed in part and remanded
IN RE J.I.K. No. 06-1070	Lenoir (05JT68)	No error
IN RE J.W. No. 06-1227	Mecklenburg (06JT339) (05JA719)	Affirmed
IN RE K.W. No. 06-1171	Iredell (04JT75)	Affirmed
IN RE MI.T., Kys.T., Ma.T., Kye.T. No. 06-1214	Buncombe (05J513-16)	Affirmed
IN RE R.G. No. 06-586	Wayne (05J18)	No error
IN RE R.M. No. 06-730	Mecklenburg (03J1146)	Affirmed
IN RE S.M.M. No. 06-1057	Hertford (05J14)	Affirmed
STATE v. DAVIS No. 05-1506	Gaston (03CRS25828) (03CRS64192-93) (03CRS67709)	No error; remanded for resentencing
STATE v. FUNDERBURK No. 06-549	Mecklenburg (03CRS212875-76) (03CRS505574)	Affirmed

STATE v. GADDY No. 06-516	Moore (05CRS4401) (04CRS54164-67)	Affirmed
STATE v. GOODE No. 06-630	Rutherford (04CRS53997-4000) (05CRS2259)	No error in part; reversed in part
STATE v. HOPPER No. 06-313	Cleveland (02CRS56601-02)	No error
STATE v. LEGRAND No. 06-398	Guilford (04CRS66339) (04CRS66344) (04CRS24198)	No error
STATE v. LYLES No. 06-198	Halifax (05CRS52366)	No error
STATE v. MANNING No. 06-489	New Hanover (02CRS5881) (02CRS6340)	No error
STATE v. OSORTO No. 06-531	Chatham (05CRS4135) (05CRS4138-42) (05CRS4157-58) (05CRS4160-62) (05CRS4151)	No error
STATE v. PARKER No. 06-426	Davidson (04CRS61146)	Dismissed
STATE v. POLLARD No. 06-721	Pitt (04CRS50805) (05CRS2097)	No error
STATE v. SPRINKLE No. 04-1291-2	Robeson (02CRS11158-59) (02CRS11161)	No prejudicial error
STATE v. SUTCLIFF No. 06-442	Pender (03CRS50223-25)	No error
STATE v. SWINTON No. 06-301	Buncombe (04CRS57081) (05CRS3556-58)	No error
STATE v. THOMPSON No. 06-247	Mecklenburg (04CRS224860-61)	No error
WELLONTON LTD. P'SHIP v. HUINS No. 06-436	Columbus (05CVD774)	Affirmed

APPENDIX

IN THE MATTER OF A PETITION
OF THE NORTH CAROLINA
STATE BAR RE:
INTEREST ON LAWYERS'
TRUST ACCOUNTS PROGRAM OF THE
NORTH CAROLINA STATE BAR

SUPREME COURT OF NORTH CAROLINA

In the Matter of a Petition of)
the North Carolina State Bar Re:)
)
)
)
)
INTEREST ON LAWYERS' TRUST)
ACCOUNTS PROGRAM OF THE NORTH)
CAROLINA STATE BAR)

ORDER

The North Carolina State Bar, authorized by Chapter 84 of the North Carolina General Statutes to regulate and supervise attorneys practicing law in this State, has petitioned this Court, in the exercise of its inherent power, to authorize and direct the North Carolina State Bar to implement a comprehensive Interest On Lawyers' Trust Accounts (IOLTA) program; and it appearing to the Court from the petition that the legal needs of only a small percentage of those people qualifying for legal assistance are being met, that access to the legal system is necessary to the maintenance of public trust and confidence in the administration of justice, and that mandatory participation in the State Bar's IOLTA program by the eligible active members of the North Carolina State Bar would likely provide substantial increased revenue to fund legal services for the poor in North Carolina and to advance the program's purposes of increasing access to justice and facilitating the administration of justice; and it further appearing that this matter is a proper subject for the exercise of this Court's inherent power to supervise and regulate conduct of members of the Bar;

Now, therefore, in the exercise of its inherent power to supervise and regulate the conduct of attorneys in this State, the Supreme Court of North Carolina does hereby order, based upon the premises set forth in the State Bar's petition, that the North Carolina State Bar implement a comprehensive IOLTA program consistent with the purposes expressed in the existing North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts, and that all active members of the North Carolina State Bar who maintain general client trust accounts in North Carolina participate in the program effective January 1, 2008.

By order of the Court in Conference, this 11th day of October, 2007.

s/Hudson, J.
For the Court

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TERMINATION OF
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WRONGFUL INTERFERENCE

UNFAIR TRADE PRACTICES
UNIFORM COMMERCIAL CODE

ZONING

VENDOR AND PURCHASER

APPEAL AND ERROR

Admission pro hac vice not sought—brief stricken—Defendants' brief was stricken where their attorney was licensed in Florida but not North Carolina and did not follow the requirements of N.C.G.S. § 84-4.1 before submitting the brief. Although she had previously appeared for defendants pro hac vice before the Supreme Court concerning one of plaintiff's petitions for discretionary review, she was required to file a motion with the Court of Appeals before seeking to represent defendants in this proceeding. Furthermore, even if she acted in reliance upon her admission by the Supreme Court, she did not associate local counsel in this appeal. **Hill v. Hill**, 69.

Appealability—*Blakely* error—case not pending on direct review—case final before *Blakely*—Defendant was not entitled to review under *Blakely v. Washington*, 542 U.S. 296 (2004), in a second-degree murder and robbery with a dangerous weapon case, because: (1) defendant's case was not pending on direct review when *Blakely* was decided; (2) defendant's case was final on 7 April 2004 before the 24 June 2004 decision in *Blakely* based on the fact that he failed to perfect a timely appeal; and (3) the granting of a petition for writ of certiorari does not alter the determination of when a case becomes final. **State v. Coleman**, 568.

Appealability—condemnation—decision on area, remand for appointment of commissioners—substantial right—A condemnation order is immediately appealable if it decides questions of title or area taken. The order here, which allowed condemnation but remanded the matter to the clerk for further proceedings, decided questions of area taken. **Progress Energy Carolinas, Inc. v. Strickland**, 610.

Appealability—denial of motion to compel arbitration—substantial right—Although defendant's appeal from the denial of its motion to compel arbitration and stay the proceedings pending arbitration is an appeal from an interlocutory order, an order denying arbitration is immediately appealable because it involves a substantial right that might be lost if appeal is delayed. **Evangelistic Outreach Ctr. v. General Steel Corp.**, 723.

Appealability—discovery order—substantial right—An order granting plaintiff's motion to compel discovery and denying defendants' motion for a protective order affects a substantial right and is immediately appealable where the discovery order compels production of reports that may be statutorily privileged. **Hayes v. Premier Living, Inc.**, 747.

Appealability—motion for stay pending appeal—mootness—Although defendant insurance company contends the trial court erred in a declaratory judgment action by denying its motion for stay pending appeal, this issue is dismissed as moot because the Court of Appeals already determined that appraisal should not have gone forward, and thus a determination of the proprietary of the trial court's denial of defendant's motion for stay pending appeal can have no practical effect on the case. **Hailey v. Auto-Owners Ins. Co.**, 677.

Appealability—partial summary judgment—Rule 54(b) certification—substantial right—Although plaintiff Foster's appeal from the entry of partial summary judgment is properly before the Court of Appeals based on the trial court's Rule 54(b) certification, and all three plaintiffs' issues of punitive damages can be reviewed based on a substantial right to have the claim determined by the

APPEAL AND ERROR—Continued

same judge and jury which heard the claim for compensatory damages, the remaining appeals are from interlocutory orders and are premature. **Foster v. Crandell, 152.**

Appealability—sovereign immunity—failure to prosecute—motion for costs—Although the denial of defendant county's motions to dismiss based on sovereign immunity affects a substantial right and is immediately appealable, those assignments of error based on the court's denial of the county's motion to dismiss for failure to prosecute and motion for costs are dismissed because the county failed to cite any authority for appeals from these interlocutory orders as required by N.C. R. App. P. 28(b)(4). **N.C. Dep't of Transp. v. County of Durham, 346.**

Appellate rules violations—affidavit stricken—matters in brief outside record—The portions of DSS's brief that provides and cites to an affidavit not included in the record on appeal in a juvenile guardianship case is stricken, because: (1) N.C. R. App. P. 9 provides that matters discussed in the brief outside the record are not properly considered on appeal since the record imports verity and binds the reviewing court; and (2) contrary to DSS's assertion that it would have to provide documents omitted from the settled record, N.C. R. App. P. 28(d)(3)(a) only addresses information from a transcript that must be included in an appendix, there is no reference in the rule to information omitted from the record, and DSS's argument was unsupported by any rule of appellate procedure. **In re L.B., 174.**

Appellate rules violations—denial of sanctions—Respondent mother's motion to dismiss and strike petitioner appellee DSS's brief on N.C. R. App. P. 13 grounds is denied, because: (1) this case deals with juvenile guardianship; and (2) respondent did not allege that she suffered any prejudice from the delay in being served with DSS's brief. **In re L.B., 174.**

Appellate rules violations—motion to deem brief timely served—motion to dismiss brief—denial of sanctions—The guardian ad litem's (GAL) motion to deem appellee GAL's brief timely served is allowed, and respondent mother's motion to dismiss GAL's brief on N.C. R. App. P. 13 grounds is denied, because: (1) this case deals with guardianship of a juvenile; and (2) respondent did not allege that she suffered any prejudice from the minimal delay in being served with the GAL's brief. **In re L.B., 174.**

Appellate rules violations—sanctions—Defense counsel is personally required to pay the printing costs of this appeal in a work-release escape case as a sanction for various appellate rules violations including: (1) the argument section is entirely single-spaced in violation of N.C. R. App. P. 26(g)(1); and (2) defense counsel failed to include a statement of the standard of review with respect to his argument challenging the trial court's denial of his motion to dismiss as required by N.C. R. App. P. 28(b)(6). **State v. Lockhart, 316.**

Appellate rules violations—statement of facts—Respondent mother's motion to dismiss the guardian ad litem's (GAL) brief and motion to strike portions of GAL's brief on N.C. R. App. P. 28 grounds in a juvenile guardianship case is denied even though respondent contends the statement of facts includes information not found by the trial court and allegedly contains misrepresentations regarding the underlying facts of the case, because: (1) the rule does not limit a

APPEAL AND ERROR—Continued

party's ability to make reference to facts supported by the evidence but not specifically found by the trial court to be able to provide the Court of Appeals with a thorough picture of the circumstances and events that led to appeal; (2) respondent cites no authority, and none was found, which limited a party's statement of facts to those found by the trial court; and (3) the GAL's statement of facts was supported by both the transcript and record on appeal. **In re L.B.**, 174.

Assignments of error—insufficiency—Defendants' assignments of error to the signing and entry of orders were dismissed as insufficient even though defendants contended that the legal bases for these assignments of error was stated earlier, that further elaboration would have added nothing, and that plaintiff and the court were on notice of the issues on appeal. **Womack Newspapers, Inc. v. Town of Kitty Hawk**, 1.

Assignments of error—record page references omitted—Rules violation not egregious—Violations of the Rules of Appellate Procedure involving the identification of assignments of errors by their record page numbers were not so egregious as to warrant dismissal or sanctions. **State v. Bradley**, 557.

Court of Appeals opinion—retroactive application—*Livingston v. Adams Kleemeir Hagan Hannah & Founts*, 163 N.C. App. 397, applies retroactively. **Wells v. Cumberland Cty. Hosp. Sys., Inc.**, 590.

Cross-assignments of error—not for affirmative relief—Defendant's argument was not the proper subject of a cross assignment of error, and was not preserved for appellate review, where defendant argued that an award of temporary disability should be reversed because it was not supported by competent evidence. Defendant was thus seeking affirmative relief rather than arguing an alternative basis for supporting the judgment. **Outerbridge v. Perdue Farms, Inc.**, 50.

Evidence objection not renewed at trial—statute then presumed constitutional—An assignment of error regarding videotapes was reviewed on appeal even though defendant did not object when the videotapes were offered into evidence. At the time, an evidence rule (N.C.G.S. § 8C-1, Rule 103(a)(2) (2005)) that did not require renewal of an objection was presumed constitutional. **State v. Burgess**, 27.

Failure to appeal ruling—issue not appealable in future litigation—Where a party fails to appeal a ruling on a particular issue, he is then bound by that failure and may not revisit the issue in subsequent litigation. **Hill v. Hill**, 69.

Former decision of Court of Appeals—alleged faulty reasoning—no authority to overrule—A subsequent panel of the Court of Appeals had no authority to overrule a prior decision which plaintiff argued was based on faulty reasoning. **Wells v. Cumberland Cty. Hosp. Sys., Inc.**, 590.

Improper application of de novo standard of review—remand not required—Although the trial court erred by its application of the de novo standard of review in a contested case hearing when it gave deference to the agency's expertise and consistency in applying various statutes, a trial court's use of an incorrect standard of review does not automatically require remand. In the instant case, the trial court's erroneous application of the de novo standard of review in no way interfered with the Court of Appeals' ability to assess how that

APPEAL AND ERROR—Continued

standard should have been applied to the particular facts of this case, and thus the merits of petitioner's arguments are reviewable. **Rainey v. N.C. Dep't of Pub. Instruction, 666.**

Incomplete record—incomplete notice of appeal—guilty pleas without preservation of evidence issue—Violations of the appellate rules resulted in dismissal of an assignment of error about the denial of a motion to suppress evidence, and Rule 2 was not invoked to hear the issue because, given the significant violations of the appellate rules, doing so would create an appeal. **State v. McDougald, 41.**

Mootness—discharge from bankruptcy—Although defendant contends the trial court erred by hearing this civil contempt case based on child support arrearages while a federal bankruptcy stay was in effect, this issue is moot and need not be addressed because defendant was discharged from bankruptcy on 28 December 2005 which was twenty days prior to the entry of the pertinent order. **Brown v. Brown, 333.**

Mootness—order expiring before appeal heard—An appeal from a civil no-contact order was dismissed as moot where the appeal was heard almost five months after the order ceased to be effective. **Williams v. Vonderau, 18.**

Mootness—public records voluntarily furnished during appeal—A portion of an appeal was moot where Town records that plaintiffs had sought under the Public Records Act were released voluntarily after appeal was taken following litigation. Although the records were released pursuant to a Town resolution stating that they were not public records, the precise relief sought by plaintiff in its complaint was granted. Exceptions to the mootness doctrine do not apply, and deciding whether the records sought were in fact public records would amount to an advisory opinion. **Womack Newspapers, Inc. v. Town of Kitty Hawk, 1.**

Notice of appeal—required—appellate entries not sufficient—An appeal by a father whose parental rights had been terminated was dismissed where the record did not include a written notice of appeal. Mere appellate entries are not sufficient to preserve the right to appeal. Furthermore, respondent did not petition for a writ of certiorari. **In re Me.B., M.J., Mo.B., 597.**

Notice of appearance of counsel—appellate counsel—The guardian ad litem's (GAL) attorney is properly appearing in a juvenile guardianship case because, while there is no order in the record naming the GAL's current counsel as appellate counsel, both respondent and the GAL agree that a notice of appearance of counsel was filed at the Court of Appeals. **In re L.B., 174.**

Preservation of issues—admission of audiotape—copy not provided to appellate court—The issue of whether an audiotape was properly admitted was not preserved for appeal where defendant did not provide the court with a copy of the tape or of the transcript that accompanied the tape at trial. Moreover, one of the participants who was on the tape was subsequently allowed to testify without objection. **State v. McDougald, 41.**

Preservation of issues—authority not cited—abandonment of assignment of error—An argument on appeal was taken as abandoned where defendant cited no authority for his assertion that the trial court had violated due process by announcing the sentence he was inclined to give before defense counsel spoke. **State v. McFadden, 131.**

APPEAL AND ERROR—Continued

Preservation of issues—constitutional issue—failure to raise at trial—The trial court did not err in an involuntary manslaughter case by failing to declare a mistrial when it was informed that the jury was having difficulty in reaching a verdict, because: (1) the constitutional issue of defendant's right to a jury trial was neither raised at the trial level nor assigned as error; and (2) plain error review is unavailable for this issue. **State v. Replogle, 579.**

Preservation of issues—defenses—not raised below—waiver—Defenses of collateral estoppel and res judicata were waived in a termination of parental rights case where they were raised for the first time on appeal. **In re D.R.S., W.J.S., 136.**

Preservation of issues—failure to argue—Two assignments of error that defendant did not argue in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Holt, 328.**

Preservation of issues—failure to argue—The remaining assignments of error that defendant failed to argue are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Clemmons, 391.**

Preservation of issues—failure to argue—The remaining assignments of error that defendant failed to present in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Erickson, 479.**

Preservation of issues—failure to assign error—Respondent mother's failure to assign error to any of the trial court's findings of fact in a termination of parental rights case makes the findings binding on appeal. **In re W.L.M. & B.J.M., 518.**

Preservation of issues—failure to include transcript—findings of fact presumed supported by competent evidence—The trial court did not err in an equitable distribution case by its findings of fact numbered 9, 25, and 26, because defendant failed to include a transcript of the hearing in the record, and thus the court's findings of fact are presumed to be supported by competent evidence. **Stone v. Stone, 688.**

Preservation of issues—failure to object on constitutional grounds—failure to assert plain error—Although defendant contends the trial court violated his right to confrontation by allowing the out-of-court statements of a witness, this assignment of error is dismissed because: (1) our appellate courts will only review constitutional questions raised and passed upon at trial; (2) defendant only lodged a general objection but did not object on constitutional grounds; and (3) defendant failed to assert plain error. **State v. Johnson, 287.**

Preservation of issues—lack of argument or authority—An assignment of error was deemed abandoned where defendant did not state any supporting reasoning or argument or cite authority. **State v. Pointer, 93.**

Preservation of issues—subsequent testimony admitted without objection—plain error not alleged—There was no plain error in a prosecution for trafficking in ecstasy where a detective was allowed to testify about his two-year investigation of defendant. While the initial testimony was over defendant's objection, subsequent detailed testimony was without objection, and defendant

APPEAL AND ERROR—Continued

did not specifically and distinctly allege plain error on appeal. **State v. McDougald, 41.**

Preservation of issues—service of process—not raised before appeal—waiver—An issue regarding service of process in a termination of parental rights hearing was waived where there was no objection at trial. **In re D.R.S., W.J.S., 136.**

Preservation of issues—waiver—switching legal theories—Although defendant contends the trial court erred by denying his motion to dismiss the charge of first-degree murder, this assignment of error has been waived, because: (1) defendant changed legal theories to support his position between the trial court and the Court of Appeals; and (2) assuming arguendo that defendant had properly presented his corpus delicti argument to the trial court and then to the Court of Appeals, it is without merit when in addition to defendant's confession the State presented evidence through the chief medical examiner that the victim died as a result of multiple gunshot wounds. **State v. Shelly, 196.**

Record—confidential informant—failure to seal file for appellate review—The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by failing to seal the confidential informant's file for appellate review, because: (1) the State did not request a protective order since the discovery statutes did not require the State to disclose information about the confidential informant who was not testifying at trial; and (2) the confidential informant's identity was not known. **State v. Leyva, 491.**

Standard of review not provided—printing costs assessed—Although defendant's assignment of error could have been dismissed for failure to provide the standard of review with citation to authorities, the single violation was not substantial and defense counsel was instead charged with the printing costs of the appeal. **Caldwell v. Branch, 107.**

Supporting arguments—not required in assignments of error—An appeal was not dismissed where the appellant did not cite authority in his assignments of error, but did so in his brief. Appellate Rule 28(b)(6) does not concern the assignments of error in the record; in fact, argument is specifically precluded from the assignments of error by Appellate Rule 10 (c)(1). **Morris v. Gray, 552.**

ARBITRATION AND MEDIATION

Arbitration agreement—terms sufficiently clear—forum selection clause—The terms of an arbitration agreement were sufficiently definite to be enforceable under the normal rules of contract law, using the "gap-fillers" provided in the statutory framework of the Uniform Arbitration Act and the Federal Arbitration Act. The forum designated by the contract, North Dakota, is appropriate because the FAA preempts North Carolina's public policy against arbitration in another state. **Goldstein v. American Steel Span, Inc., 534.**

Denial of motion to compel—failure to produce evidence of agreement to arbitrate—The trial court did not err in a fraud, unfair and deceptive trade practices, and breach of contract case by denying defendant's motion to compel arbitration where plaintiff was faxed only the front side of a purchase order and the

ARBITRATION AND MEDIATION—Continued

arbitration provision was on the back side of the order. **Evangelistic Outreach Ctr. v. General Steel Corp.**, 723.

ASSAULT

Deadly weapon on government officer—motion to dismiss—sufficiency of evidence—unequivocal appearance of attempt—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon on a government officer because, even if defendant's conduct of reaching for a gun was not in itself an overt act or an attempt to do some immediate physical injury, his conduct qualified at least as the unequivocal appearance of an attempt to harm the officers with the gun, and defendant committed this unequivocal appearance of an attempt with force and violence when, in addition to the presence of the gun, defendant struggled intensely with three officers and was not subdued until he received several blows to the head. **State v. Barksdale**, 302.

Instruction—attempted assault—plain error—The trial court committed plain error by instructing the jury on attempted assault with a deadly weapon upon a government officer because that offense does not exist in this state. **State v. Barksdale**, 302.

Specific intent to kill—evidence sufficient—The trial court did not err by denying defendant's motion to dismiss charges of assault with intent to kill inflicting serious injury where defendant presented expert testimony that he could not have formed the specific intent to kill due to mental disorders and an excessive dose of medication, and the State presented evidence of the nature of the assaults. **State v. Pointer**, 93.

ATTORNEYS

Legal malpractice—last act giving rise to cause of action—Defendant law firm's filing of a dismissal with prejudice of plaintiffs' action against an insurance company to recover for a fire loss subsequent to plaintiffs' settlement with the insurance company did not extend the three-year statute of limitations for filing a legal malpractice action arising from that claim. **Ramboot, Inc. v. Lucas**, 729.

AUTOMOBILES

Accident on snowy road—crossing center line—intent irrelevant—instruction on statutory violation—The trial court erred in a case involving a traffic accident on a snowy road by refusing to give plaintiff's requested instruction that defendant violated N.C.G.S. § 20-146(d) by failing to keep his vehicle in his lane of travel. It is irrelevant that defendant did not intentionally drive across the center line; there was evidence from which a jury could find that defendant was negligent before he lost control. **Sobczak v. Vorholt**, 629.

Accident on snowy road—sudden emergency instruction—erroneously given—awareness of risk—The trial court erred by giving a sudden emergency instruction in a case arising from a traffic accident on a snowy road. Because defendant knew or should have known that the snow could become ice in some areas, the mere fact that he did not see the icy patch in advance of hitting it is

AUTOMOBILES—Continued

insufficient to establish that he was confronted with a sudden emergency. **Sobczak v. Vorholt, 629.**

BUILDING CODES

Office building permit—moratorium on rock quarry—tolling statutory time for resuming construction—The trial court's entry of summary judgment for defendant county upholding a moratorium on heavy industry within 2000 feet of a public school and enjoining plaintiff landowner from operating a rock quarry on the property, and plaintiff landowner's appeal therefrom, tolled the statutory time period under which plaintiff could resume construction pursuant to a building permit for an office building to be used in conjunction with a rock quarry on the property, even though defendant county took no action based upon the moratorium to revoke the building permit, and plaintiff's building permit has not expired, because the summary judgment prohibited plaintiff from continuing construction pursuant to its building permit for a building to be used with the rock quarry. N.C.G.S. § 153A-358. **Sandy Mush Props., Inc. v. Rutherford Cty., 224.**

Office building permit—vested right—no vested right for rock quarry—Although a valid building permit for an office building on plaintiff landowner's property gave plaintiff a vested right under N.C.G.S. § 153A-344(b) to build an office building that plaintiff intended to use in conjunction with the operation of a rock quarry on the property, the building permit did not give plaintiff a statutory vested right to operate a rock quarry on the property after an ordinance prohibiting the quarry was enacted. **Sandy Mush Props., Inc. v. Rutherford Cty., 224.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

First-degree burglary—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree burglary at the close of all evidence, because: (1) it is appropriate to convict a defendant of burglary even if he is acquitted of the underlying felony, which was attempted rape in this case, since the issue is defendant's intent at the time of breaking and entering instead of his subsequent success following through on his plans; and (2) there was substantial evidence from which the jury could have determined that defendant entered with the intent of committing rape, but did not follow through with his plans. **State v. Holt, 328.**

Unlawful entry—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of breaking or entering even though defendant contends the State failed to prove an unlawful entry when she entered a law office that was open to members of the public, because: (1) even if an entry is initially legal, subsequent conduct of the entrant may render the consent to enter void ab initio; and (2) a jury could find that based on an attorney's prohibiting defendant from coming to his office, the first entry was nonconsensual, and even if that directive is disregarded, the jury could also reasonably find that defendant falsely told the attorney that she was in the office to see a secretary in order to obtain access to the private areas of the law offices. **State v. Perkins, 209.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING—Continued

Verdicts—misdemeanor breaking or entering—felonious larceny—not inconsistent—The jury's initial verdict of guilty of misdemeanor breaking or entering was not legally inconsistent with the jury's verdict of guilty of felony larceny of credit cards, and the trial court should have accepted the initial verdict, where evidence tended to show that defendant and a male companion made unlawful entries into nonpublic areas of a law firm in the morning; the male companion made another entry into the law firm in the afternoon and a lawyer's credit cards were stolen in the afternoon; and the jury could reasonably have found that the State failed to prove defendant's intent to commit larceny when she entered the firm in the morning and that she was guilty of misdemeanor breaking or entering based on her morning entries. **State v. Perkins, 209.**

CHILD ABUSE AND NEGLECT

Abuse—serious physical injury—bruise—The trial court did not err in a child abuse and neglect case by concluding that the four-year-old minor child's dark six-inch bruise on his right thigh which lasted well over one week was a serious physical injury by other than accidental means within the meaning of N.C.G.S. § 7B-101(1). **In re L.T.R. & J.M.R., 376.**

Best interests of child—custody awarded to father—The trial court did not abuse its discretion in a child abuse and neglect case by determining that a return to respondent mother's home was not in the best interests of the two minor children, because given the evidence establishing abuse and neglect in this case, the trial court's decision to award custody of the children to their father, to limit respondent mother's visits with the children by requiring them to be supervised, and to prohibit any contact between the children and respondent stepfather, was the result of a reasoned decision guided by the best interests of the juveniles. **In re L.T.R. & J.M.R., 376.**

Conclusion that children neglected—supported by findings—no suggestion of lack of effort by mother—The trial court's conclusion that children had been neglected was supported by findings concerning problems shown by the children in the mother's care that were not present in foster care. While that conclusion is consistent with findings concerning the living conditions of the children, it does not suggest that the mother has not made efforts to learn to better care for the children or that the neglect was willful. **In re C.P., L.P. & N.P., 698.**

Custody of neglected juvenile with DSS—visitation in DSS discretion—The trial court erred by granting DSS the discretion to determine visitation between a neglected juvenile placed in the custody of DSS and the parents. **In re D.S.A., 715.**

Custody with DSS rather than paternal grandparents—paternity not established—The trial court did not abuse its discretion by placing a juvenile in the custody of DSS when the parents were willing to place the juvenile with the paternal grandparents. The father had not submitted to paternity testing, though he did not deny being the father, DSS had not completed a home study of the paternal grandparents, and it could not be said that it was in the best interest of the juvenile to be placed in a home from which he could later be removed. **In re D.S.A., 715.**

CHILD ABUSE AND NEGLECT—Continued

Failure to receive proper care or supervision—abuse language mistakenly included in order—Although the trial court did not err by concluding that respondent father neglected both of his minor children, it erred by concluding that he abused M.W. because a review of the transcript revealed that language that could be interpreted that respondent abused M.W. was mistakenly included in the written adjudication order. **In re A.S. & M.J.W., 706.**

Findings of fact—clear, cogent, and convincing evidence—The trial court's findings on adjudication and disposition were supported by the evidence, including findings that respondent stepfather struck one of the children with a brush and caused a dark bruise on the child's thigh which lasted over a week and that respondent mother caused a bruise on another child's face during a "thumping" game. **In re L.T.R. & J.M.R., 376.**

Findings of neglect—supported by evidence—The trial court's findings indicating child neglect were supported by a DSS report, a Guardian ad Litem report, the summary of Family Preservation Services, and testimony from several witnesses, even if there was also evidence to support contrary findings. **In re C.P., L.P. & N.P., 698.**

Intentional child abuse—evidence sufficient—The State's evidence was sufficient for the jury to find that defendant intentionally inflicted injuries upon her child so as to support defendant's conviction of felonious child abuse inflicting serious injury. **State v. Wilson, 540.**

Jurisdiction—affidavit of child's whereabouts—The omission of an N.C.G.S. § 50A-209 affidavit setting forth the present addresses and names of persons with whom the child has lived during the past five years does not by itself divest the trial court of jurisdiction in a termination of parental rights case, and there is no reason to hold differently in the case of a juvenile adjudication and disposition. **In re D.S.A., 715.**

Neglect—findings of fact—The trial court did not err by concluding the juveniles were neglected as defined by N.C.G.S. § 7B-101(15) in that the minor children do not receive proper care, supervision, or discipline from respondent mother and stepfather, and live in an environment injurious to their welfare. **In re L.T.R. & J.M.R., 376.**

Neglect—removal of custody—visitation—The trial court did not err in a child neglect case by removing custody of A.S. from respondent father and by denying unsupervised visits with the child. **In re A.S. & M.J.W., 706.**

Neglect—sufficient evidence—There was sufficient information to find that a juvenile was neglected where the trial court took judicial notice of files, documents, and orders without notice to the parties. A court may take judicial notice on its own motion, and while it is better practice to give express notice to the parties, it is not required. Furthermore, the court in a bench trial is presumed to disregard incompetent evidence. **In re D.S.A., 715.**

Permanency planning hearing—failure to conduct hearing within twelve months of original custody order—The trial court did not commit reversible error in a juvenile guardianship case by failing to conduct the permanency planning hearing within twelve months of the date of the original custody order. **In re L.B., 174.**

CHILD ABUSE AND NEGLECT—Continued

Permanency planning order—considering and incorporating reports and summaries as finding of fact—The trial court did not err in a juvenile guardianship case by considering and incorporating reports and summaries from DSS and from the GAL as findings of fact in its permanency planning order. **In re L.B., 174.**

Permanency planning order—failure to comply with previous court orders—keep mother's boyfriend away from minor—The trial court did not err in a juvenile guardianship case by relying on prior court orders, DSS reports, and GAL reports to find that respondent mother has not complied with previous orders of the court to keep the minor away from respondent's boyfriend who was a sex offender from another state and living with the mother. **In re L.B., 174.**

Permanency planning order—psychological evaluation—The trial court did not abuse its discretion in a juvenile guardianship case by ordering respondent mother to undergo a psychological evaluation and by finding that she had not previously complied with the trial court's order directing such an evaluation. **In re L.B., 174.**

Permanency planning order—subject matter jurisdiction—The trial court had authority to enter its permanency planning order in a juvenile guardianship case even though the nonsecure custody order and summons were issued before the juvenile petition was signed and verified. **In re L.B., 174.**

Permanency planning order—sufficiency of findings of fact—The trial court in a juvenile guardianship case made sufficient findings of fact to support its permanency planning order as required by N.C.G.S. § 7B-907(b). **In re L.B., 174.**

Permanency planning order—visitation—The trial court erred in a juvenile guardianship case by determining in its permanency planning order that visitation between the juvenile and the mother shall be supervised by the custodians and shall be in the discretion of the custodians but shall not be unreasonably prevented. **In re L.B., 174.**

Psychological evaluation—substance abuse assessment—parenting classes—best interests of child—The trial court did not abuse its discretion in a child neglect case by ordering respondent father to undergo a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes. **In re A.S. & M.J.W., 706.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—Native American—Indian Child Welfare Act—tribal membership not established—The trial court did not abuse its discretion by finding that the Indian Child Welfare Act did not apply to a child custody case where the only evidence offered by the mother that she and the children were tribe members was her own word; no documentation was provided, and the Pokagen Band of the Potawatomi Indians did not respond to a letter mailed to them by DSS. The tribe can intervene at a later time if it determines that the mother and children are tribal members. **In re C.P., L.P. & N.P., 698.**

Custody order—no visitation findings—remanded—A child custody order was remanded where the court did not find that visitation would harm the children or provide for visitation. **In re C.P., L.P. & N.P., 698.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Interstate custody dispute—subject matter jurisdiction—The trial court did not abuse its discretion in a child custody case by concluding in a supplemental order that North Carolina was an inconvenient forum and by transferring jurisdiction to Ohio. **In re M.E., 322.**

Order changed—prior conclusion that circumstances had not changed—The trial court erred by changing a prior child support and custody order after concluding that there had not been a showing of a substantial change of circumstances. **Lewis v. Lewis, 114.**

Support—order to contact child support enforcement agency—absence of authority—The trial court erred by ordering respondent father to contact the child support enforcement agency without first establishing an appropriate amount of child support, because although a trial court may order a parent to pay a reasonable sum that will cover in whole or in part the support of a juvenile, N.C.G.S. § 7B-904(d) does not provide the trial court with authority to order respondent to contact a child support enforcement authority. **In re A.S. & M.J.W., 706.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Right to counsel—hope of leniency—totality of circumstances—failure to make written findings and conclusions—The trial court did not err by admitting defendant's confession in a murder case because defendant's statements did not unambiguously invoke his right to counsel, the confession was not made under a hope of leniency, and the trial court was not required to make written findings and conclusions where there were no material conflicts in the evidence. **State v. Shelly, 196.**

CONSPIRACY

Civil—no separate claim—There is no separate claim for civil conspiracy in North Carolina (although such a claim may associate the defendants for evidentiary purposes), and summary judgment was properly granted for defendants on a civil conspiracy claim where it was also properly granted on the underlying claims. **Esposito v. Talbert & Bright, Inc., 742.**

First-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of conspiracy to commit first-degree murder where the evidence revealed that defendant and his cousin had fought with the victims and later that day defendant and two others procured weapons, sought out the victims, and killed them. **State v. Shelly, 196.**

CONSTITUTIONAL LAW

Double jeopardy—habitual misdemeanor assault—habitual felon statute—same argument previously rejected—Although defendant contends his convictions for habitual misdemeanor assault and under the habitual felon statute violate the Fifth Amendment's prohibition against double jeopardy, he is not entitled to a new trial, because: (1) the Court of Appeals has already rejected

CONSTITUTIONAL LAW—Continued

this argument; and (2) defendant has offered no other basis for reversal. **State v. Artis, 601.**

Effective assistance of counsel—failure to move for mistrial—Defendant was not denied effective assistance of counsel in an involuntary manslaughter case based on his trial counsel's failure to move for a mistrial. **State v. Replogle, 579.**

Effective assistance of counsel—tardiness—Defendant was not denied effective assistance of counsel in a termination of parental rights proceeding even though his counsel was late on the second of five days of hearing after a lunch recess, because: (1) respondent failed to demonstrate how his attorney's tardiness caused him to be denied a fair hearing; and (2) there was no way of determining what respondent's attorney was precluded from asking based on her failure to make an offer of proof as required by N.C.G.S. § 8C-1, Rule 103. **In re L.C., I.C., L.C., 278.**

North Carolina—law and equity merged—private action for injunction—The statute allowing private actions for injunctions in animal cruelty cases (N.C.G.S. § 19A-1) was not unconstitutional under Article IV, Section 13 of the North Carolina Constitution (which provides that there shall be one form of action for the redress of private wrongs, called a civil action). **Animal Legal Def. Fund v. Woodley, 594.**

North Carolina—no right to jury trial on Rule 11 sanctions—Plaintiff was not entitled to a jury trial under the North Carolina Constitution on the Rule 11 issue of whether defendants' counterclaim was filed for an improper purpose. **Hill v. Hill, 69.**

References to pre-arrest exercise of rights—not plain error—The State's references to defendant's pre-arrest exercise of her constitutional rights to silence and counsel did not involve plain or ex mero motu error. **State v. Theer, 349.**

Right to confrontation—videotapes of interviews—declarants available for cross-examination—There was no violation of defendant's right to confrontation in the admission of videotapes of interviews between child sexual abuse victims and nurses where the children took the stand and were available for cross-examination. **State v. Burgess, 27.**

Right to counsel—offhand remark—The trial court did not abuse its discretion in a first-degree murder and possession of a weapon of mass destruction case by failing to grant a mistrial when an officer allegedly commented on defendant's invocation of his constitutional right to counsel where the officer's comment was made in response to defense counsel's question; the officer's comment, taken in context, was not of such character that the jury would have concluded it was a comment on defendant's exercise of his right to counsel; and the officer's statement taken in context was not made to shed doubt on defendant's insanity defense. **State v. Erickson, 479.**

Right to impartial jury—improper comments by trial judge—The trial court erred in a conspiracy to commit armed robbery, attempted armed robbery, three counts of armed robbery, and first-degree murder case by its actions and comments regarding defense counsel both in and out of the presence of the jury, and

CONSTITUTIONAL LAW—Continued

defendant is entitled to a new trial, because the cumulative effect deprived defendant of his constitutionally guaranteed right to a fair and impartial trial. **State v. McLean, 469.**

Right to remain silent—exercise by defendant—officer's testimony—not plain error—There was no plain error in a prosecution for attempted murder and assault in the admission of testimony from the arresting officer about defendant's exercise of his right to remain silent. The testimony was incidental to the officer's overall testimony and it is doubtful that the jury assigned it heavy weight. **State v. Watkins, 502.**

Right to unanimous verdict—allegations of coerced verdict—The trial court did not improperly coerce a verdict in a robbery with a dangerous weapon case by instructing jurors at the conclusion of the charge that they must reach a unanimous verdict. **State v. Blair, 236.**

CONTEMPT

Civil—motion for reimbursement—The trial court erred in a civil contempt case based on child support arrearages by denying defendant's motion for reimbursement of sums paid to purge himself of contempt of court where the contempt orders have been vacated. **Brown v. Brown, 333.**

CONTRACTS

Breach—summary judgment—lack of consideration—lack of change order—The trial court did not err in a breach of contract case by granting plaintiff general contractor's amended motion for summary judgment on the issue of who was responsible for the cost of installing an additional heating, ventilation, and air conditioning (HVAC) unit to the first floor of defendant's building, and by failing to grant defendant's motion for summary judgment. **Inland Constr. Co. v. Cameron Park II, Ltd., LLC, 573.**

COSTS

Attorney fees—improperly granted—The trial court erred in a civil contempt case based on child support arrearages by concluding that defendant was not entitled to recover attorney fees paid to purge himself of contempt, and this portion of the order is reversed and remanded for entry of an order directing the \$1,200 attorney fees to be paid into the office of the Clerk of Superior Court by the person or party who received it for disbursement to defendant, because it would be unconscionable to require defendant to pay for the services of plaintiff's attorney who improperly instituted contempt proceedings resulting in defendant's incarceration. **Brown v. Brown, 333.**

COURTS

Amended Qualified Domestic Relations Order—no findings indicating reason for changing order of another judge—An amended Qualified Domestic Relations Order concerning a pension was remanded where there were no findings or statements by the trial judge to indicate his reasons for modifying the order. There is thus no evidence of a material change in circumstances that

COURTS—Continued

would warrant one trial court modifying, overruling, or changing the order of another. **Morris v. Gray**, 552.

CRIMINAL LAW

Defense counsel admonished—nine comments in ten weeks—no prejudice to defendant—Nine comments by which the court admonished defense counsel about inappropriate or improper questions during a ten-week trial did not prejudice defendant or deprive her of a fair trial. **State v. Theer**, 349.

Denial of motion for mistrial—prosecutor's reference to defendant's detainment in jail and postarrest exercise of right to silence—The trial court did not err in a trafficking in cocaine by possession and trafficking in cocaine by transportation case by denying defendant's motions for a mistrial based on the prosecutor's reference to defendant's detainment in jail and his postarrest exercise of his right to silence because proper curative actions were taken by the court and no prejudicial effect resulted. **State v. Leyva**, 491.

Fingerprint—impression during crime—The trial court did not err by denying defendant's motion to dismiss charges of assault, safecracking, robbery and first-degree burglary where the State's only evidence linking defendant to the crimes was a fingerprint; defendant stated to a detective that he had never been to defendant's house; the victim testified that he was the only person with a key to the closet where the fingerprint was found; and the victim testified that the robbers broke into the closet. **State v. Wade**, 295.

Flight—instruction—The trial court did not err in a first-degree murder and conspiracy to commit first-degree murder case by its instruction to the jury on flight where the evidence presented at trial established that defendant left the scene of the shooting and did not return home, but instead he spent the night at the home of his cousin's girlfriend. **State v. Shelly**, 196.

Jury impaneled after opening argument—harmless error—The trial court's error in not impaneling the jury until after the State's opening argument was harmless. **State v. Pointer**, 93.

Jury request to view evidence—jury not returned to courtroom—appeal waived—Defendant waived any assertion of error in the court not bringing the jury back to the courtroom after its requests to review evidence by consenting to the court communicating with the jury by sending exhibits or writing a note explaining the denial of the jury's requests. **State v. Pointer**, 93.

Mistrial denied—improper character evidence—The trial court did not abuse its discretion by denying a mistrial in a prosecution for conspiracy and first-degree murder after a witness offered inadmissible bad character evidence, including the suggestion of an improper relationship between defendant and her trial counsel. The judge's findings in support of the denial of the mistrial were well supported by reason and the judge's superior position for observing the jury. **State v. Theer**, 349.

Motion for appropriate relief—abuse of discretion standard—The trial court did not abuse its discretion in a first-degree burglary case by denying defendant's post-trial motion for appropriate relief based on alleged insufficiency of the evidence because the evidence was sufficient to warrant submission of the case to the jury. **State v. Holt**, 328.

CRIMINAL LAW—Continued

Motion for mistrial—defendant's own misconduct—The trial court did not abuse its discretion by denying defendant's motion for a mistrial after a juror overheard defendant's remark to her attorney that she was leaving her own trial, and the trial court questioned the juror about the incident in front of the entire jury, because: (1) while it would have been the better practice to interview the juror individually, a review of the record indicated that the trial court nonetheless acted within its discretion when the situation was of defendant's own making since she chose to flee the trial after announcing her intentions in the public stairwell; and (2) the jurors indicated, upon polling by the trial court, that they could remain fair and impartial. **State v. Perkins, 209.**

No duty to retreat from assault—instruction should have been given—The trial court should have given an instruction that defendant had no duty to retreat from the victim's assault on him, if his version of events is believed. The victim and defendant wound up in a "sword fight" with a pitch fork and machete after an argument broke out while they were drinking at the trailer where they lived and the victim asked defendant to leave. The evidence, viewed in the light most favorable to defendant, supports a conclusion that defendant was faced with a deadly assault and responded with deadly force. **State v. Beal, 100.**

Prosecutor's closing arguments—no intervention ex mero motu—There was no error in the trial court's failure to intervene when certain remarks were made by the prosecutor during the State's closing argument in a first-degree murder prosecution. Although the prosecutor referred to defendant's "burden," the reference was followed by a clear statement of the State's burden of proof and was designed to suggest that defendant had not contradicted the State's evidence. Passing references to the victim and his mother did not improperly emphasize sympathy or pity for the victim's family, and comments about why the State's evidence should be believed or why a witness should not be believed did not rise to the level of gross impropriety. **State v. Theer, 349.**

Statements by trial judge—potential liability of witness—Fifth Amendment rights—not comment on guilt or credibility—There was no prejudice in a prosecution for first-degree murder and conspiracy from the trial judge's statements that a defense witness may have "potential liability" and that the witness "may have some Fifth Amendment rights" where the trial judge had appointed an attorney to protect the witness's Fifth Amendment rights; the trial judge thereafter stated that he had no prosecutorial responsibilities in the matter; and defense counsel was the first to elicit from the witness a possible charge of accessory to first-degree murder. **State v. Theer, 349.**

Verdict sheet with alternate definitions of crime—one offense—There was no error in the submission of an impaired driving verdict sheet which did not specify which of two statutory definitions of impaired driving applied (being under the influence or blood alcohol level). Defendant was charged with a single wrong which could be established alternatively. **State v. Bradley, 557.**

DAMAGES AND REMEDIES

Punitive damages—insufficient evidence showing genuine issue—Plaintiff Foster did not establish a claim for punitive damages where summary judgment was properly entered for defendant on her claims for intentional infliction of

DAMAGES AND REMEDIES—Continued

emotional distress and negligent supervision. Furthermore, the other two plaintiffs failed to establish claims for punitive damages where they relied only upon their allegations of intentional infliction of emotional distress and “reckless supervision” and failed to present clear and convincing evidence of willful or wanton conduct in support of their claims. **Foster v. Crandell, 152.**

Punitive damages—requirement of participation—A pastor’s behavior in counseling plaintiffs, including any sexual misconduct, cannot serve as a basis for plaintiffs to obtain punitive damages from the medical director of a Christian counseling service because punitive damages may be awarded against a person only if that person participated in the conduct giving rise to the punitive damages. **Foster v. Crandell, 152.**

DECLARATORY JUDGMENTS

Commercial casualty insurance—premature invocation of appraisal clause—Plaintiff insured prematurely invoked appraisal under a commercial casualty insurance policy for damages to his properties in an ice storm because the unsupported opinion of the insured that the insurer’s payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal. **Hailey v. Auto-Owners Ins. Co., 677.**

Procedure for administration of oaths—litigation appears unavoidable—The trial court erred by concluding that plaintiffs failed to present a justiciable controversy in their complaint for a declaratory judgment regarding the interpretation of N.C.G.S. § 11-2 describing the procedure for the administration of oaths where the State refuses to permit witnesses to swear on any text other than the Christian Bible. **American Civil Liberties Union of N.C. v. State, 430.**

DISCOVERY

Incident reports—motion to compel production—peer review privilege—The trial court did not abuse its discretion in a wrongful death action arising from alleged nursing home neglect by granting plaintiff’s motion to compel production of the three disputed incident reports and by denying defendants’ motion for a protective order pursuant to the peer review privilege set forth under N.C.G.S. §§ 90-21.22A and 131E-107. **Hayes v. Premier Living, Inc., 747.**

DIVORCE

Amended Qualified Domestic Relations Order—no findings indicating reason for changing order of another judge—An amended Qualified Domestic Relations Order concerning a pension was remanded where there were no findings or statements by the trial judge to indicate his reasons for modifying the order. There is thus no evidence of a material change in circumstances that would warrant one trial court modifying, overruling, or changing the order of another. **Morris v. Gray, 552.**

Equitable distribution—marital property—gifts—sufficiency of evidence—The trial court erred in an equitable distribution case by awarding plaintiff wife a lot valued at \$35,000 separate from the marital home because plaintiff had invested \$20,000 of her separate funds in the marital home and plaintiff’s

DIVORCE—Continued

mother had given the parties \$15,000 during the marriage for improvements to the marital home, and the case is remanded for a new distributional order, because the practical effect of awarding the lot to plaintiff outside the division of the other marital property was an unequal distribution of the marital estate; the trial court expressly found that an equal distribution of the marital estate was equitable and did not find the existence of any distributional factor under N.C.G.S. § 50-20(c); and the parties' marital home is titled as a tenancy by the entirety, and plaintiff's \$20,000 and her mother's \$15,000 totaling \$35,000 toward the marital home are presumed to be gifts to the marital estate. **Stone v. Stone, 688.**

EASEMENTS

Prescriptive—evidence sufficient—A judgment granting a prescriptive easement in a bench trial was affirmed where plaintiffs satisfied their burden of proof on the required elements. The parties were related by blood or marriage; the property involved a driveway created in 1958 that was used or maintained openly by plaintiffs or their predecessors since at least 1971. **Caldwell v. Branch, 107.**

EMINENT DOMAIN

Private condemnation—utility line—burden of proof on respondent—Respondent bore the burden of proving that the court should not grant a petition by an electric utility to condemn an easement for a power line. Petitioner is a private condemnor as described in N.C.G.S. § 40A-3(a); private condemnation proceedings are governed by Article 2 of Chapter 40A. **Progress Energy Carolinas, Inc. v. Strickland, 610.**

Private utility—airstrip affected—statutes read together—Petitioner, a private electric utility, had the authority to condemn property that affected airstrips. Statutes giving electric power companies the power of condemnation and those prohibiting airport hazards are in conflict; the most harmonious reading is that the “obstruction” and “hazard” language in the aviation statutes do not pertain to airport rights and uses that become permanently condemned through a formal condemnation proceeding and for which just compensation is received. **Progress Energy Carolinas, Inc. v. Strickland, 610.**

Private utility—extent of easement—adequately described—A petition for condemnation by an electric utility sufficiently described the extent of the easement to be condemned and whether petitioner had the authority to condemn. **Progress Energy Carolinas, Inc. v. Strickland, 610.**

Private utility—garden not affected—The trial court did not err by finding that a reasonable size garden was not affected by the easement that petitioner wished to condemn, based on respondent's burden of proof and his equivocal evidence about the size, location, and boundaries of the garden, even though the phrase “reasonable size” does not appear in N.C.G.S. § 40A-3(a). Because of this finding, that statute, which prohibits private condemnation of gardens, does not apply. **Progress Energy Carolinas, Inc. v. Strickland, 610.**

EMPLOYER AND EMPLOYEE

Covenant not to compete—factual issues concerning reasonableness—12(b)(6) not appropriate—A motion to dismiss for failure to state a claim in a covenant not to compete case should not have been granted. The enforceability of the covenant rested on factual questions such as whether the geographic effect of the client-based restrictions was excessive in light of defendant's contacts with customers, the nature of his duties, the level of his responsibilities, the scope of his knowledge, and other issues relating to how closely the geographic limits fit with defendant's work for plaintiff. **Okuma Am. Corp. v. Bowers, 85.**

Negligent hiring or retention—insufficient evidence—Defendant medical director of a Christian counseling service could not be liable for negligent hiring or retention of a pastor who counseled plaintiff where there was no evidence that defendant employed the pastor either as an employee or an independent contractor, and the evidence showed, at most, that defendant and the pastor were at one point co-employees. **Foster v. Crandell, 152.**

EMOTIONAL DISTRESS

Intentional infliction—improper supervision—insufficient showing of outrageous conduct—Plaintiff's evidence of the failure of defendant medical director of a Christian counseling service to properly supervise the pastor who counseled plaintiff did not constitute extreme and outrageous conduct necessary to establish a claim for intentional infliction of emotional distress where plaintiff did not suggest that defendant failed to disclose information about sexual misconduct by the pastor but contended that defendant failed to disclose that the N.C. Board of Licensed Counselors had demanded that the pastor cease the practice of counseling. **Foster v. Crandell, 152.**

Negligent infliction—failure to supervise counselor—Plaintiff presented a sufficient forecast of evidence to present a genuine issue of material fact supporting her claim for negligent infliction of emotional distress by defendant medical director of a Christian counseling service based upon his failure to properly supervise the pastor who counseled plaintiff where defendant does not contend that plaintiff failed to present sufficient evidence of negligence; a physician's affidavit explained how defendant's negligence caused plaintiff severe emotional distress and, with plaintiff's other summary judgment evidence, was sufficient to raise a genuine issue of material fact as to whether it was reasonably foreseeable that severe emotional distress could result in the pastor's clients if defendant negligently failed to supervise him; and plaintiff offered evidence that she suffered diagnosable mental health conditions as a result of defendant's alleged negligence. **Foster v. Crandell, 152.**

ESCAPE

Indictment—work-release prisoner—improper statutory citation—language sufficiently apprised of charges—The trial court did not err by concluding there was no fatal variance between the indictment and the evidence presented at trial even though defendant contends the indictment charged him with felony escape under N.C.G.S. § 148-45(b)(1) rather than escape of a work-release prisoner under N.C.G.S. § 148-45(g)(1), because: (1) the indictment tracked the language of N.C.G.S. § 148-45(g); and (2) an indictment's improper statutory cita-

ESCAPE—Continued

tion is immaterial when the language of the indictment sufficiently apprises a defendant of the charge at issue. **State v. Lockhart, 316.**

Work-release escape—motion to dismiss—sufficiency of evidence—24-hour exception—The trial court did not err by denying defendant's motion to dismiss the charge of work-release escape even though defendant contends he returned voluntarily within twenty-four hours, and his derivative assignments of error challenging his habitual felon indictment on the ground that his escape conviction was invalid are also dismissed, because: (1) although the State's evidence demonstrated that defendant was recaptured within 24 hours, it also indicated that defendant's family only surrendered him to law enforcement after officers threatened to obtain a search warrant and press criminal charges against defendant's family members for harboring a fugitive; and (2) the jury could have concluded this surrender was not a voluntary return by defendant to his place of confinement. **State v. Lockhart, 316.**

EVIDENCE

Accident report diagram—exclusion—The trial court did not err in an action arising out of an automobile accident by excluding a state highway patrol trooper's accident report diagram which showed defendant's vehicle was left of the centerline of the road at the point of impact, because: (1) the trooper did not witness the accident and reached her conclusion on the basis of her physical findings at the scene of the accident; and (2) the diagram depicting the point of impact was in essence a conclusion. **Seay v. Snyder, 248.**

Character—affairs—Wiccan religion—not prejudicial—Evidence about a first-degree murder defendant's affairs after her husband's death, her practice of the Wiccan religion, and her behavior in jail was not prejudicial in light of the overwhelming evidence of her alleged motive and involvement in the murder. **State v. Theer, 349.**

Character—alternative lifestyle—mental state, pattern of conduct, motive, corroboration—The admission of evidence about defendant's lifestyle and sexual activity was not an abuse of discretion in a prosecution for conspiracy and first-degree murder. The evidence was admissible to show a pattern of conduct, motive, and defendant's mental state, as well as to corroborate other witnesses. Limiting instructions were given and the court made extensive findings about the reasons for admitting the evidence. **State v. Theer, 349.**

Character—cumulative effect—not prejudicial—In light of the overwhelming evidence of defendant's motive for and involvement in the murder of her husband, the cumulative effect of testimony about her alternative lifestyle and sexual activity was not prejudicial. **State v. Theer, 349.**

Character—improper relationship with counsel suggested—not plain error—There was no plain error in a first-degree murder prosecution where a witness suggested an improper relationship between defendant and her counsel. The statements were made in response to an unrelated question, came in the midst of a rambling non-answer, defense counsel cross-examined the witness on the subject and impeached her credibility, and a limiting instruction was given. **State v. Theer, 349.**

EVIDENCE—Continued

Computer searches for body bags—not prejudicial—The admission of information found on defendant's computer concerning body bags was not prejudicial, even if the evidence was irrelevant, because these were just three of many documents reviewed by the court and exhibits submitted by the State, and because the evidence of guilt was overwhelming. **State v. Theer, 349.**

Defendant's drunkenness and state of mind—no plain error—There was no plain error in an attempted murder and assault prosecution in admitting statements by the woman who lived with defendant concerning his drunkenness, state of mind, condition, and actions on the Thanksgiving Day on which the shooting occurred. Although the statements may have been admissible as corroborative of her earlier testimony, their absence would not have changed the jury's verdict. **State v. Watkins, 502.**

Hearsay—defendant suspected by victim—other evidence of identity—There was no plain error in the admission of testimony from a detective that the victim of a home invasion had told him that he suspected defendant, even if this testimony was hearsay, where fingerprint evidence was sufficient to allow a reasonable jury to identify defendant as a perpetrator of the crimes. **State v. Anderson, 655.**

Hearsay—excited utterance exception—child's statements to mother—A child sexual abuse victim's statements to her mother were properly admitted as an excited utterance. Fewer than twenty-four hours had passed between the time the child's mother yelled at her for putting dolls in a suggestive position, the assault, and the child's statements to her mother. **State v. Burgess, 27.**

Hearsay—mental health records of children—The trial court did not err in a termination of parental rights case by admitting, over objection, mental health records of two of the minor children because even assuming arguendo that the records contain inadmissible hearsay, respondent has not pointed to any specific instances of hearsay upon which the trial court improperly relied. **In re L.C., L.C., 278.**

Hearsay—not offered for truth of matter asserted—explanation for officer's presence—The trial court did not err in a trafficking in cocaine case by admitting certain testimony by two detectives even though defendant contends it constituted inadmissible hearsay because the testimony was presented to explain the officers' presence at the pertinent locations, and it was not presented for the truth of the matter asserted. **State v. Leyva, 491.**

Hearsay—prior consistent statements—The trial court did not commit plain error in a robbery with a dangerous weapon case by admitting alleged noncorroborative inadmissible hearsay evidence of an officer about what the victim said immediately following the robbery about whether defendant pushed him down because at no point during his testimony did the victim state that defendant did not push him down, but only that he could not remember whether he was pushed down by defendant, and the officer testified that he saw defendant push the victim onto the ground. **State v. Wade, 295.**

Hearsay—reputation of neighborhood—not offered for truth of matter asserted—The trial court did not commit plain error in a robbery with a dangerous weapon case by admitting alleged inadmissible hearsay evidence about the

EVIDENCE—Continued

neighborhood, because: (1) the officer's testimony that he was conducting surveillance of the area where the robbery occurred on 16 April 2005 based on the police receiving numerous complaints of prostitution, street-level drugs, larcenies, shoplifting, robberies, and assaults was elicited in response to the State's questioning of the officer as to why he was conducting surveillance in that area on that day; and (2) the testimony was not admitted for the truth of the matter asserted, but instead to explain why the officer was in a position to observe the robbery. **State v. Wade**, 295.

Hearsay—state of mind exception—Conversations between a murder victim and witnesses relating to the victim's fear of defendant were admissible to show the victim's then existing state of mind at the time she made the statements, and the fact that the statements were made some time prior to the murder does not deprive them of probative value. **State v. Erickson**, 479.

Hearsay—videotapes of interviews with nurses—medical diagnosis exception—Videotapes of interviews between child sexual abuse victims and nurses satisfied the requirements of the hearsay exception for medical diagnosis and treatment. **State v. Burgess**, 27.

Opinion about victim's credibility—child sexual abuse—testimony that victim suffering from post-traumatic stress—There was no plain error in allowing a licensed clinical social worker to testify that a child sexual abuse victim was suffering from post-traumatic stress or trauma related to abuse. The State presented physical evidence supporting a diagnosis of abuse, and the court instructed the jury that expert opinion that a person suffers from post-traumatic stress may be considered as corroboration and not as substantive evidence. **State v. Burgess**, 27.

Marital counseling records—admissibility—The trial court did not abuse its discretion in a murder prosecution by compelling disclosure of a psychologist's records of marriage counseling sessions between defendant and her husband, the victim. The state of the marriage was a central issue in the trial and the court reviewed the records before disclosure. **State v. Theer**, 349.

Murdered husband's affairs—properly excluded—The exclusion of evidence about a murdered husband's alternative lifestyle and extra-marital affairs was not an abuse of discretion, and there was no prejudice, where similar evidence regarding defendant had been admitted as relevant to her state of mind, but the victim's state of mind was not in issue. Moreover, the evidence was admitted through other witnesses. **State v. Theer**, 349.

Prior crimes or bad acts—character for violence—failure to make offer of proof—The trial court did not err in a first-degree felony murder case by refusing to admit the cross-examination testimony of defendant's girlfriend (also the victim's daughter) regarding specific instances of violent threats by the victim against two other individuals, because: (1) defendant made no offer of proof concerning the proposed testimony; and (2) the witness's testimony in no way indicated that defendant was aware of previous confrontations between the victim and men who mistreated the witness, so it was unclear whether the proposed testimony would have bolstered defendant's claim that he was reasonably afraid of the victim. **State v. Clemmons**, 391.

EVIDENCE—Continued

Prior crimes or bad acts—detailed cross-examination—opening the door—The trial court did not err or commit plain error in a robbery with a dangerous weapon case by admitting the State's detailed cross-examination of defendant regarding prior charges and convictions, because: (1) during direct examination, defendant minimized the seriousness of his criminal involvement when he claimed that he was not a violent person and had never robbed anyone; (2) defendant's testimony opened the door to the State's questioning as to defendant's past criminal history; and (3) when the questioning seemed to move beyond the purposes allowable under N.C.G.S. § 8C-1, Rule 609(a), defendant's objection was sustained. **State v. Wade**, 295.

Prior crimes or bad acts—victim's lack of willingness to testify—shooting at mother's house—Testimony by a kidnapping and assault victim that he did not want to testify at defendant's trial and only did so after being jailed as a material witness, and that after he testified at a codefendant's trial “they shot my momma's house up,” but that defendant had not threatened him, did not constitute evidence of a prior bad act by defendant in violation of N.C.G.S. § 8C-1, Rule 404(b). **State v. Johnson**, 287.

Propensity for violence—context of ensuing fight—admissible—There was no error in a prosecution for assault with a deadly weapon inflicting serious injury in allowing the victim, who had known defendant since childhood, to testify that defendant became violent when drinking. The testimony was offered to provide a context for the fight which ensued after the victim asked defendant to leave rather than to prove that defendant acted in conformity with a violent disposition. **State v. Beal**, 100.

Psychologist—testimony about marital counseling—admissibility—The admission of testimony from a psychologist who had provided marital counseling to defendant and her husband was not plain error where defendant was being prosecuted for conspiring and aiding and abetting in the murder of her husband. The psychologist's opinions relate to the state of defendant's marriage and to her attitude toward her husband and their marriage, neither of which meets the definition of character evidence. The evidence was relevant in light of the State's theory of the case, and defendant did not show a probable impact on the jury's finding of guilt. **State v. Theer**, 349.

Testimony—undisclosed witness—The trial court did not err in a trafficking in cocaine case by excluding a witness's testimony regarding the reliability of confidential informants, because: (1) it was within the trial court's discretion to deny defendant's request to allow an undisclosed witness to testify during the trial as either an expert or as a lay witness; and (2) the witness's potential testimony was not in the interest of justice. **State v. Leyva**, 491.

Victims upset—relevant to lives being threatened—There was no plain error in an armed robbery prosecution in the admission of testimony that the victims were upset, emotional, distressed, and scared during the crime. The testimony suggests that the victims' lives were endangered and threatened by defendant's actions; endangering or threatening human life is the gravamen of armed robbery. **State v. Anderson**, 655.

Witness to shooting—defendant heard, not seen—testimony rationally related to perception of event—There was no error in allowing the victim of

EVIDENCE—Continued

an assault and attempted murder to testify that he was shot by defendant, even though he did not see defendant shoot him. The victim, defendant's uncle, heard defendant's voice during the shooting and had sufficient personal knowledge to identify him. **State v. Watkins, 502.**

FALSE PRETENSE

Indictment—false representation of subsisting fact—An indictment charging defendant with obtaining property by false pretenses was not fatally defective even though defendant contends the indictment failed to allege a false representation of a subsisting fact because by alleging that defendant used credit and check cards that were issued in the name of another person, that were wrongfully obtained, and that she had no permission to use, the indictment sufficiently apprised defendant that she was accused of falsely representing herself as an authorized user of the cards. **State v. Perkins, 209.**

Sufficiency of evidence—false representation—intent to deceive—The trial court did not err by denying defendant's motion to dismiss the charge of obtaining property by false pretenses even though defendant contends the State failed to present sufficient evidence of false representation and of defendant's intent to deceive the store because a jury could reasonably infer from the evidence that defendant, through her actions, falsely represented to the store her authority to use the victim's credit cards and that her intent was to deceive the store. **State v. Perkins, 209.**

FIREARMS AND OTHER WEAPONS

Possession of firearm—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of possession of a firearm even though defendant contends the State failed to present substantial evidence showing he had possession of the handgun that was resting in the grass about six inches from his outstretched hand, because there was ample circumstantial evidence suggesting that defendant had possession of the gun before he was tackled to the ground by police officers. **State v. Barksdale, 302.**

HOMICIDE

Attempted murder—defendant as perpetrator—evidence sufficient—There was sufficient evidence, in the light most favorable to the State, that defendant was the perpetrator of a shooting, and the court did not err by denying defendant's motion to dismiss a charge of attempted murder. **State v. Watkins, 502.**

Attempted murder—indictment—sufficiency—An indictment for "attempted murder" without allegations of specific intent, premeditation, or deliberation was not defective. **State v. Watkins, 502.**

Attempted murder—premeditation and deliberation—evidence sufficient—The evidence was sufficient to establish premeditation and deliberation in a prosecution for attempted murder, taken in the light most favorable to the State. **State v. Watkins, 502.**

HOMICIDE—Continued

First-degree murder—conspiracy—sufficiency of evidence—There was sufficient evidence that defendant was a perpetrator in a prosecution for first-degree murder and conspiracy to murder. Although much of the evidence was circumstantial and did not rule out every hypothesis of innocence presented by the defense, it was ample and sufficient to allow the jury to make reasonable inferences of defendant's guilt. **State v. Theer**, 349.

First-degree murder—failure to instruct on second-degree murder—The trial court did not commit plain error in a first-degree murder case by failing to give an instruction ex meru motu on second-degree murder based on alleged evidence that defendant did not have the ability to form the requisite intent to commit first-degree murder, because the State established each element of first-degree murder by evidence that: defendant believed that messages from television and radio programs were telling him to return to North Carolina and kill the victim; defendant returned to North Carolina, went to the victim's house, and shot her without any provocation; and although a psychologist's testimony tended to establish defendant was unable to understand whether his actions were right or wrong, he did not testify that defendant was unable to plan his actions or that he lacked the ability to premeditate and deliberate. **State v. Erickson**, 479.

First-degree murder—indictment—failure to allege each element—sufficiency—Our Supreme Court has already concluded that an indictment charging defendant with first-degree murder is sufficient even though it does not allege every element of first-degree murder. **State v. Shelly**, 196.

Involuntary manslaughter—culpable negligence—sufficiency of evidence—There was sufficient evidence of culpable negligence to support defendant's conviction of involuntary manslaughter where the State's evidence revealed that defendant was holding a gun like one does when shooting a gun, the gun discharged killing the victim, and the gun did not have a hair trigger and it could not have been fired without actually pulling the trigger. **State v. Replegole**, 579.

Second-degree murder—sufficiency of evidence—The trial court did not err in a second-degree murder case by granting defendants' motions to dismiss, because: (1) while the State's evidence raises a strong suspicion of defendants' guilt, it does not permit a reasonable inference that defendants were responsible for the death of the victim; (2) the evidence established at most that defendants had the opportunity to commit the crime; (3) none of the State's witnesses identified the victim as the man involved in the struggle with defendants, or as the man a witness saw in the road near the pertinent residence; and (4) there was testimony indicating there were other unidentified males in the area around the same time the murder allegedly occurred. **State v. Myers**, 310.

Short-form murder indictment—aggravating factors not required—Aggravating factors were not required to be alleged in a short-form murder indictment. **State v. Hasty**, 144.

HUSBAND AND WIFE

Antenuptial agreement—payments for ending tobacco allotments—Defendant disclaimed her rights to decedent's separate property as well as the income and proceeds from that property by the plain language of an antenuptial

HUSBAND AND WIFE—Continued

agreement, and the trial court correctly granted summary judgment for plaintiffs in an action seeking assignment to them of payments from the federal government for ending tobacco allotments. **Brown v. Ginn, 563.**

Contract to sell entirety property—signature of husband—absence of written authorization by wife—A written contract to sell realty owned by defendants as tenants by the entirety was unenforceable where the complaint shows that the contract was signed only by defendant husband, and there was no indication that defendant wife provided the husband with written authority to act on her behalf. **Burgin v. Owen, 511.**

IMMUNITY

Sovereign—condemnation action between county and State—The trial court did not err in a condemnation action arising as part of a road-widening project for a state road in southwestern Durham County by denying defendant county's motion to dismiss based on sovereign immunity because the county's sovereign immunity cannot be superior to that of the State when the counties derive their sovereign immunity and all other powers and authority from the State. **N.C. Dep't of Transp. v. County of Durham, 346.**

INDIANS

Custody—Native American—Indian Child Welfare Act—tribal membership not established—The trial court did not abuse its discretion by finding that the Indian Child Welfare Act did not apply to a child custody case where the only evidence offered by the mother that she and the children were tribe members was her own word; no documentation was provided, and the Pokagen Band of the Potawatomi Indians did not respond to a letter mailed to them by DSS. The tribe can intervene at a later time if it determines that the mother and children are tribal members. **In re C.P., L.P. & N.P., 698.**

INJUNCTIONS

Permanent—unverified complaint—sufficiency—An unverified complaint was sufficient to obtain a permanent injunction in an animal cruelty case. N.C.G.S. § 19A-3, which requires verification, applies only to preliminary injunctions. **Animal Legal Def. Fund v. Woodley, 594.**

INSURANCE

Automobile—five vehicles—computer limitations—two policy numbers—one policy—The trial court properly granted summary judgment for plaintiff insurer where two policy numbers were issued to cover five vehicles in one family due to the limitation of plaintiff's computer system. Given language in the policy declarations, the explanatory letters from plaintiff, the billing under one number with the same renewal periods, cross-referencing of the policy numbers, and the fact that the insureds were only charged once for UIM coverage, the insureds had only one policy providing UIM coverage, and there was no genuine issue of material fact as to whether a reasonable person would think that there were two policies. **Allstate Ins. Co. v. Stilwell, 141.**

INSURANCE—Continued

Automobile—liability—entitlement to recovery in excess of insurance policy—The trial court did not err in a breach of contract case arising out of a personal injury action by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's action against defendant insurer to recover a judgment entered against its insured in excess of the insurance policy on the grounds that the insurer in bad faith refused to settle plaintiff's original claim and failed to protect its insured from an excess verdict. **Taylor v. N.C. Farm Bureau Mut. Ins. Co.**, 343.

Automobile—setoff—medical payments from UIM coverage—express terms of policy—The trial court correctly granted summary judgment for defendant automobile insurer in an automobile accident case where plaintiff argued that the amount paid to plaintiff under the medical payments part of the insurance policy was improperly set off from the amount due under the UIM portion of the policy. Defendant acted properly under the express terms of the policy. **Kessler v. Shimp**, 753.

Commercial casualty insurance—premature invocation of appraisal clause—Plaintiff insured prematurely invoked appraisal under a commercial casualty insurance policy for damages to his properties in an ice storm because the unsupported opinion of the insured that the insurer's payment was insufficient does not rise to the level of a disagreement necessary to invoke appraisal. **Hailey v. Auto-Owners Ins. Co.**, 677.

Not-for-hire commercial vehicle—minimum amounts—read into policy—The provisions N.C.G.S. § 20-309(a1) are inserted into every insurance policy issued for not-for-hire commercial vehicles. The trial court here did not err by granting summary judgment against the insurer in an action involving an injury suffered by a child as he left a church bus, so that the policy was reformed to include that statutory minimum coverage of \$750,000.00. **N.C. Farm Bureau Mut. Ins. Co. v. Armwood**, 407.

Underinsured motorist—highway patrol trooper—injury while chasing fleeing suspect on foot—The causal connection between a highway patrol trooper's broken ankle incurred while chasing defendant across a field on foot following a traffic stop and the use of defendant's underinsured vehicle is too tenuous to invoke the underinsured motorist coverage issued to the trooper. **Smith v. Harris**, 585.

JURISDICTION

In personam—waiver—The trial court did not err in a fraud, unfair and deceptive trade practices, and breach of contract case by denying defendant's motion to dismiss based on lack of in personam jurisdiction, because defendant waived the right to challenge the exercise of personal jurisdiction when: (1) defendant moved to dismiss for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1), but defendant did not cite Rule 12(b)(2) or move to dismiss based on lack of personal jurisdiction; and (2) the record does not contain any defense motion to dismiss for lack of personal jurisdiction. **Evangelistic Outreach Ctr. v. General Steel Corp.**, 723.

JURY

Challenge for cause—failure to make futile effort to challenge juror—The trial court did not abuse its discretion in a first-degree felony murder case by

JURY—Continued

refusing to excuse two prospective jurors for cause, because: (1) a defendant must make a futile effort to challenge a juror after exhausting peremptory challenges in order to demonstrate prejudice, and it is insufficient for defendant to simply challenge a juror for cause, exhaust all peremptory challenges, and then renew his previous challenge for cause in order to preserve his exception; (2) during the process, defendant never challenged the twelfth juror or indicated that he would have used a peremptory challenge to excuse him if he had any peremptory challenges remaining; and (3) although it is clear that defendant sought to have a peremptory challenge restored prior to passing on the twelfth juror, there is nothing in the record to indicate that he would have used that restored challenge to excuse that juror, and thus, defendant cannot show he was forced to seat a juror whom he did not want based on exhaustion of his peremptory challenges. **State v. Clemons**, 391.

Selection—trial judge excused himself from courtroom—Although the trial court erred in a trafficking in cocaine case by excusing himself from the courtroom during jury selection and failing to decide all questions about the competency of the jurors as required by N.C.G.S. § 15A-1211(b) by allowing the attorneys to stipulate to the removal of jurors for cause, defendant failed to show that he was prejudiced in any way by this error. **State v. Leyva**, 491.

Unanimous verdict—multiple instances of child sexual abuse—Defendant's right to a unanimous verdict was not violated in a prosecution for multiple counts of first-degree sexual offense of a child where the dates and locations of the acts alleged were not included on the verdict sheets. **State v. Burgess**, 27.

JUVENILES

Court supervision—admission of violations—inquiry by trial court—The trial court did not err by not making the specific inquiries enumerated in N.C.G.S. § 7B-2407 when reviewing a juvenile's admissions of violations of court supervision. N.C.G.S. § 7B-2407 is the juvenile corollary of the statute advising adults of the consequences of a guilty plea, and does not apply to admissions by a juvenile of violations of the conditions of court supervision. **In re D.J.M.**, 126.

KIDNAPPING

Home invasion—confinement, removal or restraint—-independent of burglary and armed robbery—The State presented sufficient evidence to allow the jury to conclude that defendant committed acts of confinement, removal, or restraint with respect to each victim, separate and independent of his commission of burglary and armed robbery. **State v. Anderson**, 655.

Home invasion—release in a safe place—more than relinquishing control required—There was sufficient evidence that the victims were not released in a safe place for the submission of charges of first-degree kidnapping to the jury where defendant participated in a home invasion, moved the residents of the home within the house and garage, and fled the scene after an altercation with one of the residents and after the police were called. Defendant's constructive presence lingered, and release must be more than the relinquishment of dominion or control over a person. **State v. Anderson**, 655.

KIDNAPPING—Continued

Instructions—use of disjunctive—consistency with indictment—There was no plain error in the jury instructions on kidnapping which used “or” between the methods of accomplishing the crime (confining, restraining, or removing) rather than “and” as used in the indictment. **State v. Anderson, 655.**

Restraint and removal—incident to other crimes—The trial court erred by denying a motion to dismiss a kidnapping charge where robbery and assault were also charged, and the confinement, restraint or removal were part of those crimes. **State v. Wade, 295.**

LARCENY

Acting in concert—sufficiency of evidence—The trial court did not err by denying defendant’s motion to dismiss the charge of felonious larceny of credit cards, because: (1) a jury could reasonably determine that defendant acted in concert with a coparticipant to commit larceny; (2) defendant ultimately admitted that she had been given the cards by her coparticipant; and (3) there was substantial evidence that defendant and her coparticipant acted together in pursuit of a common plan or purpose and that defendant was therefore guilty of larceny even though the breaking or entering to steal the credit cards was actually committed by the coparticipant. **State v. Perkins, 209.**

Verdicts—felony larceny—not guilty of felony breaking or entering—When a jury is instructed that a defendant may be guilty of felony larceny because she acted in concert with another individual following a breaking or entering, a conviction for felony or larceny is legitimate even though defendant may be found not guilty of felony breaking or entering. **State v. Perkins, 209.**

LIBEL AND SLANDER

Defamation—actual malice—The trial court did not err in a defamation case by granting summary judgment in favor of defendant newspaper on the issue of whether defendant published an article with actual malice that plaintiff county commissioner had attempted to pressure a letter writer into helping a friend of plaintiff. **Bowser v. Durham Herald Co., 339.**

Defamation—affidavits—The trial court did not err in a defamation case by granting summary judgment in favor of defendant even though defendant presented affidavits to the trial court that allegedly raised questions concerning the credibility of the witnesses who provided affidavits to defendant. **Bowser v. Durham Herald Co., 339.**

MEDICAL MALPRACTICE

Negligent supervision—statutes of limitation and repose—Plaintiff Foster’s claims against defendant medical director of a Christian counseling service for injuries allegedly received during counseling by a pastor constituted medical malpractice claims for purposes of the statutes of limitation and repose where plaintiff asserted personal injury claims against defendant director that are premised entirely upon defendant’s negligent or reckless failure, as the supervising clinical psychiatrist, to adequately utilize his specialized knowledge and skill to supervise the pastor’s counseling practices. **Foster v. Crandell, 152.**

MOTOR VEHICLES

Contributory negligence—instruction—general duty to drive on right hand side of road—The trial court did not err in an action arising out of an automobile accident by instructing the jury on the general duty to drive on the right hand side of the road as evidence of contributory negligence, because: (1) despite there being sufficient room for both vehicles to pass each other, defendant testified that both vehicles were driving in the middle of the road just before the accident; and (2) although plaintiff contends the instruction misled the jury since it did not take into account the narrowness of the pertinent road, the trial court also instructed the jury about the correspondingly increased duty of care based on increased dangers at a scene and that the width and nature of the roadway are taken into account in determining whether a vehicle was being operated at a speed greater than was reasonable and prudent. **Seay v. Snyder, 248.**

Contributory negligence—sufficiency of evidence—The trial court did not err in an action arising out of an automobile accident in a curve of a rural road by submitting the issue of contributory negligence to the jury, because: (1) defendant's testimony that plaintiff was in the middle of the road tended to show that plaintiff did not exercise proper lookout and control of her vehicle; (2) statement made by defendant on the date of the accident tended to show that plaintiff did not exercise proper lookout or control of her vehicle; and (3) the trooper's testimony regarding the skid marks of both cars tended to show that both vehicles skidded approximately the same distance before impact and that neither plaintiff nor defendant exercised proper control of their vehicles. **Seay v. Snyder, 248.**

Driving while impaired—requested instruction—testimony of interested witnesses—uniformed police officers—The trial court did not err in a driving while impaired case by failing to give N.C. Pattern Jury Instruction 104.20, testimony of interested witnesses, with respect to the testimony of a uniformed officer who investigated the case. **State v. McQueen, 417.**

NEGLIGENCE

Contributory negligence—motion for directed verdict—sufficiency of evidence—The trial court did not err in an action arising out of an automobile accident by denying plaintiff's motion for a directed verdict based on alleged insufficient evidence of plaintiff's contributory negligence. **Seay v. Snyder, 248.**

Requested instruction—driving on narrow single lane road—duty to decrease speed or stop—The trial court did not err in an action arising out of an automobile accident by failing to give plaintiff's requested instruction to the jury that a motorist has a duty when driving on a narrow single lane road to slow down and if necessary stop in order to yield the right of way within a narrow lane of travel because the requested instruction was not supported by the evidence since the road was wide enough to allow two vehicles to pass, and plaintiff even testified that there was room for two vehicles to pass each other safely at the point where the collision occurred. **Seay v. Snyder, 248.**

PARTIES

Motion in limine—reference to attorney for plaintiff's underinsured motorist carrier unnamed defendant—The trial court did not err in an action

PARTIES—Continued

arising out of an automobile accident by denying plaintiff's motion in limine which sought to allow the attorney for plaintiff's underinsured motorist carrier to be referred to as representing the unnamed defendant. **Seay v. Snyder**, 248.

PLEADINGS

Denial of motion for sanctions—Plaintiff Bucks' outstanding motion for sanctions against the attorneys for defendant attorney and his law firm is denied. **Ramboot, Inc. v. Lucas**, 729.

Motion to strike allegations—Public Records Act compliance—relevant and material—The trial court did not err by not striking allegations in an amended complaint that sought public records where defendant contended that the allegations contradicted or were not supported by the Town records, but the allegations questioned the Town's compliance with the Public Records Act and not the accuracy of the records. **Womack Newspapers, Inc. v. Town of Kitty Hawk**, 1.

Sanctions—counterclaim and motion for sanctions—not filed for improper purpose—The trial court did not err by failing to find that defendants' counterclaim and motion for Rule 11 sanctions were filed for an improper purpose where the counterclaim was filed to vindicate defendants' rights under the forfeiture clause in their mother's will, and the record shows that defendant only sought to obtain sanctions against plaintiff for bringing a frivolous claim that was substantially similar to a previous claim which the Court of Appeals had held violated the factual certification requirement of Rules 11. **Hill v. Hill**, 69.

PUBLIC RECORDS

Documents held by law firm rather than town—Public Records Act applicable—Records concerning engineering, surveying, and other professional services rendered to defendant-Town in connection with oceanfront condemnation litigation were public records even though they were not held by the Town. The Town paid for the records and they were made or received in connection with the transaction of public business. The law firm holding the records was duly appointed as the Town's attorney and was a public officer of the Town subject to the Public Records Act in its dealings with the Town. **Womack Newspapers, Inc. v. Town of Kitty Hawk**, 1.

Reporter who made initial request and town clerk not necessary parties—The trial court did not err by refusing to dismiss a public records complaint for lack of standing and failure to join necessary parties where the action was not brought by the reporter who made the initial request and the Town clerk was not named as a defendant. The requests for the records were made on behalf of plaintiff newspaper, and all of the responsible Town officials were included. **Womack Newspapers, Inc. v. Town of Kitty Hawk**, 1.

Writ of mandamus for release—appropriateness—The trial court did not err by refusing to dismiss a petition for a writ of mandamus for the release of certain Town records. Although defendants argued that the records were not public records and that releasing them was in the Town's discretion, so that a writ of mandamus was not appropriate, the records are in fact public records subject to disclosure. **Womack Newspapers, Inc. v. Town of Kitty Hawk**, 1.

ROBBERY

Dangerous weapon—denial of requested instruction—mere possession of dangerous weapon—The trial court did not err in a robbery with a dangerous weapon case by denying defendant's request for a special jury instruction about mere possession of a dangerous weapon, because: (1) the evidence does not support defendant's contention that he merely possessed a knife while stealing the victim's wallet; and (2) the trial court's instructions informed the jury in substance that mere possession of the weapon was not enough and defendant must have used the weapon to endanger or threaten the life of the victim. **State v. Wade, 295.**

Dangerous weapon—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon even though defendant contends there was insufficient evidence that he took property by use or threatened use of a dangerous weapon and he endangered or threatened the victim's life with a dangerous weapon, because: (1) although the victim did not see defendant's knife until defendant was taken into custody, an officer who witnessed the incident testified that defendant, while holding a knife in his right hand and the recently stolen wallet in his left hand, threatened to harm the victim immediately after a short chase through the streets; (2) the officer testified he first saw the knife in defendant's hand right after defendant stood up after pushing the victim and taking his wallet; and (3) while defendant testified that he was holding a crack pipe and not a knife in his hand, this contradiction is a matter for the jury to decide. **State v. Wade, 295.**

Sentencing—aggravated common law robbery—armed robbery—not identical offenses—Aggravated common law robbery and armed robbery do not have identical elements, even when the aggravating factor of use of a deadly weapon is included. There was no plain error in the sentencing classification given to defendant where he contended that he should have been convicted of aggravated common law robbery rather than armed robbery because common law robbery has the lesser sentence. Moreover, defendant was correctly sentenced as an habitual felon. **State v. McFadden, 131.**

SCHOOLS AND EDUCATION

National board teaching certification—eligibility—The trial court did not err by concluding that petitioner's eligibility for the North Carolina National Board for Professional Teaching Standards program should be governed by N.C.G.S. § 115C-296.2 even though petitioner contends it had not yet taken effect when she completed the certification process, because: (1) N.C.G.S. § 115C-296.2 became effective on 1 July 2000; (2) petitioner's letter to the State Board dated 27 June 2001 stated that she was notified that she had achieved National Board Certification on 30 November 2000; and (3) the date when petitioner finished submitting her application materials is not the crucial date, but instead the date when the National Board deemed petitioner certified controls. **Rainey v. N.C. Dep't of Pub. Instruction, 666.**

National board teaching certification—salary increase—The trial court erred by withholding the twelve percent salary increase from petitioner, a career development education teaching coordinator, under North Carolina's National Board for Professional Teaching Standards program. **Rainey v. N.C. Dep't of Pub. Instruction, 666.**

SEARCH AND SEIZURE

Search of shop within curtilage—permission from woman living with defendant—The trial court did not err by concluding that a search of a shop outside of defendant's house was constitutional where the court's findings, supported by the evidence, were that the woman who gave permission for the search had lived with defendant for 13 years, officers seeking her permission had known of her status as a resident of the house for about three or four years and had no reason to suspect that she lacked control over the premises, and her consent was voluntary and without hesitation. **State v. Watkins, 502.**

SENTENCING

Aggravating factors—failure to submit to jury—harmless error analysis—The trial court committed harmless error in a driving while impaired case by sentencing defendant to an enhanced sentence based on aggravating factors that were not proven to a jury beyond a reasonable doubt, including that the negligent driving of defendant led to an accident causing property damage in excess of \$500 and the negligent driving of defendant led to an accident causing personal injury, because: (1) a common law procedural mechanism existed for submission of aggravating factors to the jury in that North Carolina permits the submission of aggravating factors to a jury using a special verdict; and (2) the overwhelming and uncontested testimony at trial was that defendant totaled the victim's car and that one of the occupants of the car was bleeding from her face after the accident and was subsequently treated at the emergency room. **State v. McQueen, 417.**

Aggravating factors—offenses committed with use of deadly weapon—acting in concert—The trial court did not commit plain error in a kidnapping and assault with a deadly weapon inflicting serious injury case by concluding there was sufficient evidence to support submission of the aggravating factor that the offenses were committed with the use of a deadly weapon, even though defendant himself had no weapon, where defendant's coparticipant committed the offenses with the use of a deadly weapon. **State v. Johnson, 287.**

Aggravating factors—position of leadership or dominance of other participants—The trial court did not err in a kidnapping and assault with a deadly weapon inflicting serious injury case by concluding there was sufficient evidence to support submission of the aggravating factor that defendant occupied a position of leadership or dominance of other participants in the commission of the offenses. **State v. Johnson, 287.**

Aggravating factors submitted to jury prior to *Blakely* Act—no error—The trial court did not err by submitting aggravating factors to the jury between the United States Supreme Court ruling in *Blakely v. Washington*, 542 U.S. 296 (which held that any fact that increases the penalty for a crime must be found by a jury) and the passage of North Carolina's *Blakely* Act. **State v. Wilson, 540.**

Aggravated sentences—special verdict—The trial court did not err in a kidnapping and assault with a deadly weapon inflicting serious injury case by aggravating defendant's sentences, because: (1) at the time of defendant's trial, the applicable statute was the unamended version of N.C.G.S. § 15A-1340.16 (2004) which required the trial court to find aggravating factors not admitted by defendant by a preponderance of the evidence and to make written findings; (2) North

SENTENCING—Continued

Carolina law permits the submission of aggravating factors to a jury using a special verdict; and (3) the trial court complied with the limitations for a special verdict set forth in *State v. Blackwell*, 361 N.C. 41 (2006). **State v. Johnson, 287.**

Greater sentence after plea bargain rejected—judge's comment—no suggestion of causation—The trial judge did not err in the sentence imposed where he had commented that the sentence pursuant to a plea bargain would be 117 months, and he ultimately sentenced defendant to 145 to 183 months after defendant rejected the plea bargain. The trial judge made no comments at sentencing to suggest that he was imposing the sentence as a result of defendant's rejection of the plea. **State v. McFadden, 131.**

Habitual impaired driving—no double jeopardy violation—Habitual impaired driving does not violate double jeopardy under *Apprendi v. New Jersey*, 530 U.S. 466. *Apprendi* and *Blakely* involve the right to a jury rather than double jeopardy. **State v. Bradley, 557.**

Jury finding needed for increased sentence—rule not retroactively applied—The rule of *Blakely v. Washington*, 542 U.S. 296, concerning increased sentences without a jury finding or a stipulation, did not apply here because defendant's case was final at the time *Blakely* was issued. Defendant later moved for a writ of certiorari from the Court of Appeals. **State v. Hasty, 144.**

Plea bargain refusal mentioned—sentence less than plea bargain—no plain error—There was no plain error in the sentencing of defendant for armed robbery and kidnapping where the prosecutor mentioned defendant's rejection of a plea bargain, but defendant did not object and received a lesser sentence than he would have received had he taken the plea bargain. **State v. Anderson, 655.**

Prior record level—use of worksheet—stipulation—The trial court did not err in determining defendant's prior record level from the State's sentencing worksheet where defense counsel immediately began describing mitigating factors without objecting to any of the convictions on the worksheet and thus stipulated to those convictions. **State v. Wade, 295.**

Range—driving while impaired—The trial court did not err in a driving while impaired case by giving defendant a minimum and maximum sentence. **State v. McQueen, 417.**

Restitution—unsworn statements of prosecutor—The trial court erred in an involuntary manslaughter case by ordering defendant to pay restitution to the victim's father in the amount of \$12,850, because: (1) the amount of restitution recommended by the trial court must be supported by evidence adduced at trial or at sentencing; (2) the unsworn statements of the prosecutor do not constitute evidence and cannot support the amount of restitution recommended; and (3) even though defendant did not specifically object to the trial court's entry of an award of restitution, this issue was preserved for appellate review under N.C.G.S. § 15A-1446(d)(18). **State v. Replogle, 579.**

SEXUAL OFFENSES

Against child—indictment—specific sexual act not alleged—language of statute—A superceding indictment for sexual offense against a child was sufficient where it conformed to the language of N.C.G.S. § 14-27.4(a)(1) even though

SEXUAL OFFENSES—Continued

it did not specify the sexual act of which defendant was found guilty. **State v. Burgess, 27.**

First-degree—instruction on attempt not given—not supported by evidence—The trial court did not err by not instructing the jury on attempted sexual offense in a prosecution for first-degree sexual offenses against children. No evidence presented at trial would support a jury finding of attempted sexual offense. **State v. Burgess, 27.**

Penetration—evidence sufficient—There was sufficient evidence of penetration in a prosecution for first-degree sexual offenses against children and the trial court did not err by refusing to dismiss the charges. **State v. Burgess, 27.**

STATUTES OF LIMITATION AND REPOSE

Incompetency—not tolled—The trial court did not err by granting summary judgment for defendant hospital based on the statute of repose for medical malpractice actions where plaintiff argued that the statute was tolled by his incompetency. The identical argument was raised and rejected in *Livingston v. Adams Kleemeir Hagan Hannah & Founts*, 163 N.C. App. 397. **Wells v. Cumberland Cty. Hosp. Sys., Inc., 590.**

Medical malpractice claims—issue of material fact—Plaintiff presented sufficient evidence to present genuine issues of material fact as to whether plaintiff's medical malpractice claims against the medical director of a Christian counseling service were filed within the three-year statute of limitations and the four-year statute of repose. **Foster v. Crandell, 152.**

Municipal water supply—dirty water furnished to dry cleaner—The trial court erred by granting summary judgment for defendant town on a claim for breach of implied warranty of merchantability arising from the provision of water which damaged the clothes at plaintiff's dry cleaning business. The claim is not completely barred because plaintiff could not determine whether the water was fit for use prior to purchase. However, the two-year statute of limitations for contract claims against local governments limits plaintiff to seeking damages for the two years preceding the lawsuit. **Jones v. Town of Angier, 121.**

Provision of dirty water to dry cleaner—continuing injury—The statute of limitations had run and the trial court did not err by granting defendants' motions for summary judgment on a negligence claim that involved the flushing of water pipes and the provision of water with sediments which stained clothes at plaintiff's dry cleaning business. The injury was a continuing one that was apparent to plaintiff for more than three years. **Jones v. Town of Angier, 121.**

TERMINATION OF PARENTAL RIGHTS

Fundamental fairness—service—presence at hearing—A termination of parental rights was vacated where there were questions of fundamental fairness raised by issues concerning service and a hearing which lasted only twenty minutes at which no counsel was present for the mother. Her arrival in the courtroom after the completion of the hearing does not constitute a waiver of notice. **In re K.N., 736.**

TERMINATION OF PARENTAL RIGHTS—Continued

Judicial notice—prior orders and various court reports in juveniles' underlying case files—The trial court did not err in a termination of parental rights case by taking judicial notice of the prior orders and various court reports in the juveniles' underlying case files. **In re W.L.M. & B.J.M., 518.**

Past abuse—reasonable probability of continued abuse—emotional and behavioral problems—The trial court did not abuse its discretion by terminating respondent father's parental rights, because: (1) the trial court found that all three children had been abused and exhibited symptoms of that abuse, and respondent admitted that he physically beat and abused the children; (2) the court determined there was a reasonable probability that respondent would again abuse the children if they were returned to his care based on the testimony of respondent's individual therapist; and (3) the children's therapist testified the children suffered various emotional and behavioral problems including post-traumatic stress disorder based on the abuse. **In re L.C., I.C., L.C., 278.**

Personal service at permanency hearing—summons not required—The trial court had subject matter jurisdiction to terminate parental rights where the action began with a petition alleging neglect and dependency; the motion for termination was filed more than two years later, so that petitioner was required to serve the motion pursuant to N.C.G.S. § 1A-1, Rule 4; and the motion for termination and the notice were personally served on respondent at a permanency planning hearing. A summons is not required. **In re D.R.S., W.J.S., 136.**

Subject matter jurisdiction—failure to attach order conferring custody of children upon DSS—The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on the fact that no order conferring custody of the children upon DSS was attached to the motion, and the motion to terminate respondent's parental rights was not void ab initio. **In re W.L.M. & B.J.M., 518.**

Subject matter jurisdiction—failure to comply with time limits—failure to show prejudice—The trial court did not lack subject matter jurisdiction in a termination of parental rights case based on its failure to comply with the time limits set forth in N.C.G.S. § 7B-1109. **In re W.L.M. & B.J.M., 518.**

Subject matter jurisdiction—untimely motion to terminate parental rights—The trial court did not lack subject matter jurisdiction in a termination of parental rights case based upon the untimeliness under N.C.G.S. § 7B-907 of the motion to terminate respondent's parental rights. **In re W.L.M. & B.J.M., 518.**

UNFAIR TRADE PRACTICES

Termination of employment—commerce not affected—The trial court did not err by granting defendants summary judgment on a claim for unfair and deceptive trade practices arising from the termination of plaintiff's employment where there was no forecast of evidence that defendants' statements had any impact beyond the employment relationship. Plaintiff did not show that defendants' statements and actions were in or affecting commerce. **Esposito v. Talbert & Bright, Inc., 742.**

UNIFORM COMMERCIAL CODE

Security interest—accounts receivable—The trial court did not err by granting summary judgment in favor of defendant bank based on its determination that the bank had a priority lien position with respect to monies owed by plaintiff to Forsyth Drywall because, although CM executed a security agreement with Forsyth Drywall prior to the date of the bank's 26 June 2002 loan to Forsyth Drywall, the bank nonetheless has priority since it was the first to file a financing statement. **Rentenbach Constructors, Inc. v. CM P'ship**, 268.

VENDOR AND PURCHASER

Contract to purchase home—cost of repair contingency—termination of contract—return of earnest money—The trial court did not err in a breach of contract case by entering summary judgment allowing plaintiff purchasers to recover the \$10,500 earnest money deposit they gave to defendant sellers after plaintiff's terminated the contract to purchase a home based upon structural defects where a cost of repair contingency addendum to the purchase contract permitted plaintiffs to terminate the contract and reclaim their earnest money "if a reasonable estimate of the cost of repairs" discovered pursuant to inspections permitted by the contract "exceeds \$1,000," and plaintiffs acted in a reasonable manner and in good faith and fair play when, within the 14-day time period for inspections stated in the contract, they arranged inspections of the home, received reports that the home had structural defects that would cost more than \$10,000 to repair, and gave notice to defendants that they were exercising their option under the cost of repair contingency addendum to terminate the contract. **Dysart v. Cummings**, 641.

Contract to sell entirety property—signature of husband—absence of written authorization by wife—A written contract to sell realty owned by defendants as tenants by the entirety was unenforceable where the complaint shows that the contract was signed only by defendant husband, and there was no indication that defendant wife provided the husband with written authority to act on her behalf. **Burgin v. Owen**, 511.

WARRANTIES

Municipal water supply—dirty water furnished to dry cleaner—The trial court erred by granting summary judgment for defendant town on a claim for breach of implied warranty of merchantability arising from the provision of water which damaged the clothes at plaintiff's dry cleaning business. The claim is not completely barred because plaintiff could not determine whether the water was fit for use prior to purchase. However, the two-year statute of limitations for contract claims against local governments limits plaintiff to seeking damages for the two years preceding the lawsuit. **Jones v. Town of Angier**, 121.

WITNESSES

Children—competency—There was no plain error in allowing the victims of child sexual abuse to testify where they each took the stand outside the presence of the jury and were questioned by the State and the trial court, each demonstrated an ability to distinguish between the truth and a lie, stated that it was good to tell the truth and bad to lie, and understood that telling a lie led to punishment. The court made detailed findings as to their competency. **State v. Burgess**, 27.

WORKERS' COMPENSATION

Actual notice—further findings—reasonable excuse for delay in written notice—A finding of actual notice of the injury by accident in a workers' compensation case meant that findings about written notice and prejudice to defendant by plaintiff's delay in providing written notice were not required. Furthermore, a finding that plaintiff gave verbal notice of the injury to her shift supervisor constituted an implicit finding that plaintiff had a reasonable excuse for failing to give written notice within thirty days of the accident. **Legette v. Scotland Mem'l Hosp.**, 437.

Additional compensation for safety violations—liability of employer—The Industrial Commission did not err by concluding that the North Carolina Insurance Guaranty Association was entitled under the plain language of a workers' compensation policy to seek reimbursement from the employer (Branch) of a 10% addition to plaintiff's compensation imposed for willful violations of OSHA regulations and paid by NCIGA. **Vogler v. Branch Erections Co.**, 457.

Additional compensation for safety violations—statutory and policy language—The North Carolina Insurance Guaranty Association was obligated to pay an additional 10% on a workers' compensation claim where N.C.G.S. § 97-12 allowed the increase when a health or safety violation occurred, the policy which NCIGA assumed when the issuing company was declared insolvent provided that the insurer would pay the benefits required by the workers' compensation law, and the policy also included language that provided coverage for an insured's intentional failure to comply with a health and safety statute. **Vogler v. Branch Erections Co.**, 457.

Disability—findings—insufficiency—Industrial Commission findings in a workers' compensation case were not sufficient for the Court of Appeals to determine the rights of the parties, and the case was remanded, where plaintiff contended that he had proven his disability, the Commission found that plaintiff had been released to work but had not sought employment, and the Commission made no detailed findings as to plaintiffs injuries or limitations or about any of the factors in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762. **Plott v. Bojangle's Rests., Inc.**, 61.

Emergency treatment—compensable—binding findings supporting conclusions—Industrial Commission findings in a workers' compensation case were deemed binding where the assignments of error were not supported by arguments in the brief. The findings supported conclusions that the medical treatment received by plaintiff was reasonably necessary for an emergency, and that defendants must pay for treatments given at specific times. **Cash v. Lincare Holdings**, 259.

Expert testimony—methodology—credibility—The Industrial Commission did not abuse its discretion in a workers' compensation case by admitting the opinion of a psychiatrist that was allegedly not based on scientific, technical, or otherwise specialized knowledge, because: (1) plaintiff's contentions on appeal only challenge the methodology of the expert's opinion which goes to the weight of her testimony and not the admissibility; and (2) North Carolina does not apply the gatekeeping function articulated by *Daubert*, 509 U.S. 579 (1993), but instead leaves the duty of weighing the credibility of the expert testimony to the trier of fact. **Lane v. American Nat'l Can Co.**, 527.

WORKERS' COMPENSATION—Continued

Failure to make additional findings—causation—occupational disease—The Industrial Commission did not err in a workers' compensation case by failing to make additional findings as to causation and failing to make findings as to each element of an occupational disease, because: (1) the Commission is not required to find facts as to all credible evidence, but only those facts which are necessary to support its conclusions of law; and (2) the Commission is not required to make findings of fact as to each element of an occupational disease claim upon denial, and the denial may be predicated upon the failure of the claimant to prove any one of the elements of compensability. **Thomas v. McLaurin Parking Co., 545.**

Failure to rule on discovery motions—implicit ruling—The Industrial Commission did not improperly fail to rule on certain discovery motions brought against plaintiff because an implicit ruling was made on the motions brought forward on appeal to the Commission. **Lane v. American Nat'l Can Co., 527.**

Failure to seek suitable employment—benefits discontinued erroneously—The Industrial Commission erroneously applied N.C.G.S. § 97-32 to discontinue workers' compensation benefits after plaintiff was released to work but failed to make reasonable efforts to find suitable employment. Defendant had not accepted compensability for plaintiff's claims and plaintiff was not receiving benefits. It is illegal to apply N.C.G.S. § 97-32 to a claim that has been denied and is in litigation. **Plott v. Bojangle's Rests., Inc., 61.**

Findings of facts—nurse lifting patient—lymphedema—There was competent evidence in a workers' compensation case supporting the Industrial Commission's findings of the facts in a case where a nurse suffered lymphedema after lifting a patient. Those findings were binding even though there was evidence to support contrary findings. **Legette v. Scotland Mem'l Hosp., 437.**

Findings of fact—sufficiency of evidence—The Industrial Commission did not err in a workers' compensation case by its findings of fact 7, 8, and 9, because: (1) plaintiff confused the distinction made by the Commission between the evidence regarding the employment causing the aggravation of the arthritis and the employment causing the arthritic condition; and (2) neither doctor testified that plaintiff's employment caused his arthritis nor that his employment placed him at a greater risk for contracting arthritis. **Thomas v. McLaurin Parking Co., 545.**

Findings—wage earning capacity not addressed—error—The Industrial Commission's findings were not sufficient to support its conclusion that a workers' compensation plaintiff was limited to his impairment rating benefits (and not continued disability) after he was determined capable of sedentary work. The Commission did not address plaintiff's wage earning capacity. **Outerbridge v. Perdue Farms, Inc., 50.**

Going and coming rule—contractual duty exception—home health aid not reimbursed for first visit of the day—agreed policy at hiring—The workers' compensation contractual duty exception to the going and coming rule did not apply to a home health aid as she traveled from her home to the home of the first patient of the day. Plaintiff was not reimbursed for expenses in traveling to the first patient's home in the morning, and she understood and agreed to this policy when she was hired. **Hollin v. Johnston Cty. Council on Aging, 77.**

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Going and coming rule—traveling salesman exception—not applicable to home health aid with fixed hours and patients—The workers' compensation traveling salesman exception to the going and coming rule did not apply to a home health aid who was injured as she traveled from her home to the home of the first patient of the day. Plaintiff had fixed hours and the same patients every week. **Hollin v. Johnston Cty. Council on Aging**, 77.

Injury by accident—nurse lifting patient—short-staffed—The findings of the Industrial Commission in a workers' compensation case establish that a nurse who suffered lymphedema after lifting a patient was performing a task that was not part of her normal work routine and that she suffered an accident. Moving patients was normally a two-person job, but the hospital was understaffed and plaintiff had to position her body differently than normal and use more force than was normal. **Legette v. Scotland Mem'l Hosp.**, 437.

Motion for leave to submit additional evidence—implicit ruling—The Industrial Commission did not improperly fail to rule on plaintiff's motion for leave to submit additional evidence because an implicit ruling was made on the motions brought forward on appeal to the Commission. **Thomas v. McLaurin Parking Co.**, 545.

Notice—actual—findings supported by plaintiff's testimony—Plaintiff's testimony supported findings in a workers' compensation case that she had provided actual notice of her injury. A mistake in the date was not material. **Legette v. Scotland Mem'l Hosp.**, 437.

Occupational disease—causation—employment placed at greater risk—The Industrial Commission did not err by concluding that plaintiff was not entitled to compensation for degenerative arthritis in his hip as an occupational disease where it found that plaintiff showed that his job placed him at an increased risk of aggravating his arthritic condition than the general public but failed to show that his job placed him at an increased risk of developing degenerative arthritis in his hip than the general public not so employed. **Thomas v. McLaurin Parking Co.**, 545.

Occupational disease—failure to make necessary findings—greater risk of contracting psychological condition—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff did not suffer a compensable occupational disease due to his employment, and the case is remanded for entry of necessary findings, because: (1) work-related depression or other mental illness may qualify as a compensable occupational disease under appropriate circumstances; and (2) the Commission failed to make any finding of fact resolving the conflicting testimony as to whether plaintiff was placed at a greater risk for contracting his psychological condition than the general public. **Lane v. American Nat'l Can Co.**, 527.

Possibility of future medical treatment—appeal not interlocutory—An appeal from a workers' compensation case involving payment for medical treatment was not interlocutory even though defendant argued that other hearings on the same issue were possible in the future. The Commission's order resolved all issues surrounding the disputed treatment and did not contemplate further hearings. The fact that the order did not determine wage compensation did not render the appeal interlocutory; the determination of medical compensation is

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separate from the determination of disability compensation. **Cash v. Lincare Holdings**, 259.

Record reopened for plaintiff—no additional material from defendants—The Industrial Commission did not abuse its discretion in a workers' compensation case by not allowing defendants to re-depose their expert witnesses, or to present new briefs or arguments, after plaintiff was allowed to take the deposition of a doctor after the evidence closed. Defendants had the opportunity to cross-examine plaintiff's expert during the deposition, they never requested the opportunity to re-depose their witnesses, and the Commission ruled only that no further oral arguments or briefs would be required, not that defendants could not present additional arguments. **Legette v. Scotland Mem'l Hosp.**, 437.

Reopening record—no abuse of discretion—The Industrial Commission did not abuse its discretion by reopening the record in a workers' compensation case to receive further evidence. **Legette v. Scotland Mem'l Hosp.**, 437.

Statutory employer—Independent oil company and convenience store contractor/subcontractor relationship—Defendant, a wholesale petroleum dealer, was a statutory employer of a convenience store cashier under N.C.G.S. § 97-19 for workers' compensation purposes where defendant had a contractor/subcontractor relationship with the uninsured convenience store owner, and the store owner markets and sells gasoline which defendant is required to do by its contract with the producer (Amoco), notwithstanding defendant and the store owner also have a landlord/tenant relationship. **Masood v. Erwin Oil Co.**, 424.

Testimony as expert—experience in treating condition—Testimony from a doctor in a workers' compensation case about whether plaintiff's accident aggravated her lymphedema was sufficiently reliable, based on the experience of the doctor in treating lymphedema. **Legette v. Scotland Mem'l Hosp.**, 437.

Testimony of doctor—sufficiency—The testimony of a doctor in a workers' compensation case did not present "could" or "might" testimony and was not based solely on the notion of post hoc ergo propter hoc (after it, therefore because of it). The doctor repeatedly testified to a medical certainty that plaintiff's accident at work probably aggravated her pre-existing lymphedema, and that plaintiff's description of the accident was consistent with trauma of the type associated with the development of lymphedema in someone with plaintiff's medical history. **Legette v. Scotland Mem'l Hosp.**, 437.

Use of personal vehicle required—covered by Act—The Workers' Compensation Act covers injuries to employees who are required to furnish a personal vehicle as part of their employment and who are injured going to or coming from work. The public at large can choose its mode of transportation, but the home health aid in this case was required to use her vehicle as part of her employment. **Hollin v. Johnston Cty. Council on Aging**, 77.

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